THE SUPREME COURT, TOTALITARIANISM, AND THE NATIONAL SECURITY OF DEMOCRATIC AMERICA 1941-1960

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PREFACE

In the past twenty years much of world history has been shaped by the ideological and physical struggle between the forces of totalitarianism and democracy. Within these two brief decades the western democracies have survived the onslaught on German National Socialism and Italian Fascism as well as successfully overcoming the designs of Japanese imperialism, only to see the advent of a new force, international Communism. The latter has led to new stresses and strains on the democratic state, and has culminated in the extension of governmental action beyond its previous confines. This dissertation proposes to examine and anlyze only a small facet of this conflict. It seeks to extract from the statements of the Supreme Court an understanding of the response of that body to the proliferation of programs undertaken by the United States to preserve its institutions and to safeguard its people. The study seeks to ascertain the disposition of cases that relate to national security, and in so doing to illuminate the role of the Court and its conception of national security. A synthesis of judicial thought in these disparte areas will afford some insight into the nature of the judicial process as it deals with the clashes between totalitarianism and democracy. Insofar as it is possible this study is made to determine whether such a synthesis is possible, and also whether the Supreme

Court has articulated an explicit judicial philosophy of the content of national security.

The period nominated for analysis is 1941 to 1960. The year 1941 is selected because it marks the entrance of this country into the Second World War. The same date represents the beginning of a concerted effort on the part of the political branches of the government to insure internal security. The terminal date of the dissertation is June, 1960, the close of the Supreme Court's 1959 term. Numerous controversies have merited the attention of the Court in this twenty-year period. Some contain constitutional questions of major import. Other disputes have been of only minor importance. All of the major cases are discussed and most of the minor ones that relate, even perpherially, to national security. Not only the decisions of the Court, but also its rationalizations are significant. These indicate the extent of consensus on the Court and also reveal the nature of internal disagreements about the appropriate scope of judicial action.

In a study of this magnitude certain limitations necessarily have been imposed. In the first place, this is a study of the Supreme Court; therefore, I have omitted from consideration judgments rendered by the lower federal courts except where these decisions are essential for an understanding of the Supreme Court's attitude. Secondly, I have not attempted to discuss or analyze the major programs initiated by the government to deal with security. Only those pieces of legislation or executive pronouncements that have

figured in Supreme Court opinions are considered. Finally, the vast legislative and administrative machinery that has mushroomed over the last two decades is beyond the scope of this study. In short, this is a dissertation about what the United States Supreme Court has said, how it has said it, and what it has decided in adjudicating the immense problems growing out of challenges made against governmental action in the field of national security.

I wish to express my appreciation to Dr. Lynwood M. Holland and Dr. William H. Agnor for their assistance in the preparation of this dissertation. My adviser, Dr. Ronald F. Howell, has given unstintingly of his time and his invaluable counsel. To him I extend my deepest gratitude.

CHAPTER I

HISTORICAL PERSPECTIVE

Historically, policies affecting national security -- internally and externally -- have been the chief concern of the political branches of government. Yet like most questions of public policy where the interests of the state clash with those of the individual the judiciary has been called upon to intervene. The Supreme Court has been hampered in its task by the numerous and often imprecise constitutional provisions relating to national security. In its effort to fashion a judicial philosophy in the most sensitive of areas, national self-preservation, the Supreme Court has evoked unending controversy in the halls of Congress and at the White House. Nor has the Court itself been spared the internal divisions and fluctuating public reaction that accompanied its opinions.

The Problem of Security in the Democratic State. All of the above presupposes that the Supreme Court has a role to play in the unfolding pattern of national security, and that it functions within the context of the democratic process. National security involves national survival, "the freedom from foreign dictation."[1] It embraces

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[1] Harold Lasswell, National Security And Individual Freedom (New York, McGraw-Hill, 1950), p. 51.

the basic common denominator of all nations, the desire to retain autonomy and independence. "Self-preservation is the first law, and necessary to the exercise of all other powers."[2] In totalitarian societies the omnipresent and omnipotent state can move rapidly and without fear of restrictions to suppress any threat to its security. The democratic state often lacks this flexibility, operating as it does within the framework of limited government and with individual liberty usually guaranteed by a written constitution. President Abraham Lincoln, sorely perplexed by this apparent paradox during the Civil War, raised this challenging interrogation: "Must a government of necessity be too strong for the liberties of its own people, or too weak to maintain its own existence?"[3]

American democracy adheres to the rule of law formulated by A. V. Dicey and defined as the substitution of law for personal and arbitrary power and exercised by ordinary courts.[4] Furthermore, Dicey contended that no man was above the law but was amenable to the jurisdiction of properly constituted tribunals. If one is to be consistent with this doctrine, then it follows that the supremacy of law operates in time of stress as well as during periods of tranquility.

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[2]Jonathan Elliott, The Debates in the Several State Conventions on The Ratification of the Federal Constitution (Washington, 1854), II, p. 430.

[3]James D. Richardson, A Compilation of The Messages and Papers of the Presidents (New York, 1897), VII, p. 3224.

[4]A. V. Dicey, Introduction to the Study of The Law of The Constitution (9th ed., London, Macmillan, 1950), p. 193.

As the United States Constitution embodies prescribed and prohibited powers, and underscores the rule of law, the continuing problem is to find sufficient resiliency to meet domestic and international crises.

Other democratic states find this flexibility incorporated in their constitutions or laws. For centuries national emergencies have created the climate for the assumption of dictatorial powers by a single individual or an all-powerful government.[5] Such concentration of power has taken various forms. British jurisprudence, for example, has recognized that the rule of law may be supplanted temporarily by martial law in times of extreme emergency.[6] The French have shown a disposition to rely on "the state of seige." Based on French history and law, such extreme action results in "suspension of certain enumerated individual rights, more particularly the right to be tried in an ordinary court, the right to free speech, and the right to free assembly."[7] Article 48 of the Weimar Constitution is another example of provision in the fundamental law for the exercise of extraordinary power.[8] There is no provision in the American constitution comparable

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[5] Guy Stanton Ford, ed., Dictatorship in the Modern World (Minneapolis, 1935).

[6] Carl J. Friedrich, Constitutional Government And Democracy (Boston, Ginn, and Co., 1950), p. 576.

[7] Ibid., p. 577.

[8] The pertinent provisions of Article 48 are as follows: "If public safety and order in the German Commonwealth is materially disturbed or endangered, the National President may take the necessary measure to restore public safety and order, and, if necessary to intervene by

to the "state of seige" or Article 48, nor for that matter does the document specifically authorize the establishment of martial law. But the Constitution does not render the government powerless to curb threats to the national security. Various articles are designed to permit the nation to act with deliberate speed when its survival is at stake.

Whatever may be the state of the Constitution with respect to emergencies, the Supreme Court has agreed that threats to the national security do not result in the suspension of constitutional rights and obligations. Perhaps no more positive statement of this position can be found than the Court's assertion in 1866: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances."[9] Thus the doctrine inter armes leges silent or "necessity knows no law" is not accepted as constitutionally sound in the United States. At various times in American history, some have urged such a view or a close approximation to it as the only practical approach in times of unprecedented emergencies. John Quincy Adams, in a debate before the House of Representatives in 1836, found support for the war powers outside the Constitution.

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force of arms. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153."

[9] Ex parte Milligan, 4 Wall. 2, 120-21 (1864).

> In the Authority given to Congress by the Constitution of the United States to declare war, all the powers incidental to war are, by necessary implication, conferred upon the government of the United States. Now the powers incidental to war are derived, not from internal municipal sources, but from the laws and usages of nations.[10]

It should be noted that Adams' view does not suggest constitutional abdication. On the contrary he finds adequate power in the Constitution to protect the nation. Such a position is entirely compatible with the democratic system, assuming of course that the laws and usages of nations are not intrinsically undemocratic. However, the clear recognition that "the powers incidental to war" are by nature inherent in any state and a necessary concomitant of sovereignty has found recent substantiation from no less an authoritative spokesman than a member of the Supreme Court of the United States. Justice George Sutherland, speaking for the Court in 1936, contended:

> It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality.[11]

Neither Sutherland nor Adams failed to take note of the supremacy of

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[10] Quoted by William Whiting, War Powers Under the Constitution of the United States (Boston, 1871), p. 77.

[11] United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 318.

the Constitution. In the same case aforementioned, Sutherland was careful to observe that these various powers, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[12] The great elasticity in the interpretation of inherent powers lies not in what the Constitution forbids, but in its silence. And because of the somewhat vague meaning of constitutional provisions concerning national security, it is reasonable to suppose that, in the absence of explicit authority or express prohibitions, the resort is to what Adams called the laws and usages of nations. This assumption would seem to sanction extremely broad national power. Perhaps the danger implicit in this approach is the tendency to assume, in times of grave emergencies, that the law of nations supersedes the Constitution. Such a view has had its advocates.[13]

The foregoing comprehends powers of national self-preservation based on sovereignty and fortified by specific constitutional authorization. This view rejects constitutional suspension in wartime, but offers a wide latitude of power. What powers are permissible in this area? An examination of the proceedings of the Federal Convention of

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[12] Ibid., p. 320.

[13] Whiting, p. 167. William Whiting was an official in the Lincoln Administration. In 1871 he wrote, "If it is justifiable to commence and continue war, then it is justifiable to extend the operations of war until they shall have completely attained the end for which it was commenced by the use of all means employed in accordance with the rules of civilized warfare."

1787, though appropriate, affords little in the way of clarification.

The Constitutional Convention of 1787. The delegates who met at Philadelphia in 1787 were not unfamiliar with the perils of a weak government. The impotence of the Congress under the Articles of Confederation had been largely responsible for the present gathering. In the realm of defense, this weakness was especially noticeable. While given power to declare war, contingent on the assent of nine states, the Congress lacked the authority to raise a national Army and had to depend on the several state militias.[14] An analysis of the debates of the summer of 1787 fails to indicate major or protracted disagreement with respect to measures for defense. In essence the controversy, whenever it existed, was one of procedure and implementation rather than a quarrel over substantive power. As one commentator has noted:

> In a sense the central question before the Convention was to discover an acceptable and effective redistribution of authority between the thirteen states and their general government. Military power, which is the essential concomitant of governmental authority, however organized, was therefore certain to be under prominent discussion as proposals for the redistribution of authority were analyzed and debated. And as was to be expected, the delegates supported strong or weak national military establishments in accordance with their views on the larger question of a strong or weak national government.[15]

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[14]Articles of Confederation, Article IX. Article VI prohibited a State from going to war "unless such state be actually invaded by enemies, or shall have received certain advice or a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted."

[15]Louis Smith, American Democracy and Military Power (Chicago, University of Chicago Press, 1951), p. 18.

The major proposals presented at the Convention had reference to the powers of waging war, either explicitly or implicitly. Edmund Randolph presented the Virginia Plan on May 29, 1787. There was no specific reference to the nature of the powers to be exercised by the general government pertaining to national security other than the stipulation that the new government be charged with "common defense, security of liberty and general welfare."[16] In response to the Virginia Plan, William Patterson of New Jersey, advanced counter-proposals for the small states. His plan was silent on national defense. However, since this scheme would retain those powers that had been exercised under the Articles, presumably no material alterations were intended.[17] Charles Pinckney proposed that a Senate and House of Delegates jointly have the power to raise a land force and equip a navy, and provide for the appointment of officers in these branches. The President was designated as Commander-in-Chief of the Armed Services.[18] Alexander Hamilton preferred to give the Senate the power to declare war, but in other respects his plan resembled Pinckney's. However, he wanted to prevent the President from using his position as Commander-in-Chief to take personal command of the fighting forces in the field without prior consent of the Senate and Assembly.[19]

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[16] Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven, 1911), I, p. 20.

[17] Farrand, III, 615.

[18] Ibid., p. 607.

[19] Ibid., p. 606.

That someone was to have authority to declare war was certain. Mild disagreement existed as to the most appropriate body. The solution was to give Congress that power. Of perhaps more significance was the phraseology selected for this clause. As originally drafted the wording was "to make war." James Madison and Elbridge Gerry were successful in persuading the Convention to substitute "declare" for "make," thereby leaving "to the Executive the power to repel sudden attacks."[20]

It was generally agreed that Congress should have the power to raise an Army and Navy. Some fears were expressed that such a provision might serve as an instrument of tyranny. Some delegates sought to impose a numerical limit on armed forces in peacetime. This proposal failed after George Washington's caustic observation that this country should require a similar limitation of potential enemies.[21] One restriction was included in the Constitution in an effort to placate the apprehensions of the opponents of this provision. In connection with the raising of an Army, "no appropriation of money to that use shall be for a longer term than two years."[22] Nonetheless, opposition to this particular article developed. One of the strongest opponents, Luther Martin, remarked before the Maryland legislature:

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[20] Farrand, II, 318.

[21] Ibid., p. 323.

[22] Article I, Section 8, Clause 12.

> This plan of government, instead of guarding against a standing Army, that engine of arbitrary power which has so often and so successfully been used for the subversion of freedom, has in its formation given it an express and constitutional sanction, and hath provided for its introduction.[23]

It was fully expected that the President would assume major control in the prosecution of war as evinced by the decision of the Convention to make him Commander-in-Chief of the Armed Services and of the state militias, when called into national service.[24] In this way civil supremacy would be preserved. With respect to the powers of the President in the area of national defense, aside from the previously mentioned provision, little can be determined as to the view of the founders on the scope of such powers. Two other provisions of Article II do furnish the chief executive with apparently broad powers. "The executive power shall be vested in a President of the United States of America";[25] and, "he shall take care that the laws be faithfully executed."[26]

In substance the powers affecting national security find express sanction in Article I, Section 8, Clauses 10-18, and in the presidential powers that seem at best to be undefined. The Constitution is silent on the nature of emergencies that permit the government to

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[23] Farrand, III, 207.

[24] Article II, Section 2.

[25] Article II, Section 1.

[26] Article II, Section 3.

invoke these powers. The states are forbidden to engage in war.[27] Insofar as the national government is concerned, the war powers are subject to restraint whenever they violate any express provision of the Constitution. To these may be added the general statements found in the Preamble of the Constitution and Article I, Section 8, Clause 1, concerning "common defense."

It might indeed be expected that the arguments over the ratification of the Constitution would illumine the relationship of the Constitution to national security. In state convention proceedings, however, there are few references to indicate that these were areas of serious contention. Opponents argued that the new Constitution encouraged the perpetuation of a standing Army. Objections were made from time to time concerning constitutional provisions relating to the state militia and its control. Far more attention was focused on the other provisions of the Constitution.[28] It seems natural to assume that there was general agreement upon the necessity of expanded powers for common defense, and the lack of detailed debate may be attributed in part to preoccupation with more controversial questions. Probably the participants in the great debate failed to foresee the perplexing issues that would confront future generations in the interpretation and application of these powers. The Federalist Papers do provide insights into the views of Hamilton and Madison

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[27] Article I, Section 10, Clause 3.

[28] Elliott, Debates, 4 vols.

respecting the security and safety of the nation. The former was quite forthright in his assessment of the requirements:

> The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[29]

And in a later essay he remarked, "Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise by a single hand."[30] Hamilton does not indicate whether his analysis of the Constitution comports with this view or whether he is expressing an opinion of what the Constitution should provide. Madison, on the other hand, does not go so far as to suggest the removal of "constitutional shackles," but the following statement lends credence to an expansive construction of the Constitution:

> Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American union. The powers requisite for attaining it must be effectually confided to the federal councils.[31]

In view of the various conflicting opinions on the constitutional framework for insuring national security, the ambiguity of some of

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[29] The Federalist, No. XXIII.

[30] Ibid., No. LXXIV.

[31] Ibid., No. XLI.

its provisions, and its silence in many areas, it is understandable that subsequent crises would require more explicit statement of constitutional doctrine. The Supreme Court, because of the nature of the judicial function, is not designed to initiate policy in this or any other area of governmental activity. Nevertheless, as the final arbiter of constitutional questions, its opinions have added importance in the adjustment of that document to national emergencies. Consequently, to provide a substantial basis for a study of the Supreme Court and national security in the tumultous years of 1941 to 1960, necessitates an examination of judicial policy as reflected in its reaction to questions germane to national security down to the commencement to World War II. A general survey of comments on the powers of national security will be followed by an analysis of the Court's opinions in two great conflicts, the Civil War and World War I.

The Supreme Court's Assessment of the Constitutional Nature of National Security. It has already been stated that the doctrine that necessity abrogates the Constitution is without merit in American constitutional law. Constitutional provisions contain explicit authorization for preserving national security, whatever meanings may be merely implicit within those provisions. In many instances the assumption of supreme power is held to be justification for exercising the powers necessary to insure national security. As early as 1795 the Court remarked:

> In every government, whether it consists of many states or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy . . ."[32]

As that power is a logical corollary of sovereignty and national supremacy, it admits of extension commensurate with the crises of the times. Justice Joseph Story, concurring in an opinion of the Court in 1814, observed: "The power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect."[33] The following statement of Justice Sutherland is characteristic of this view:

> From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property, and of life.' To the end that war may not result in defeat, freedom of speech may by act of Congress be curtailed or denied so that the morale of the people and the spirit of the Army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies heretofore under the protection of the Constitution seized without compensation and without due process of law in the ordinary sense of the term; prices of food and other necessities of life fixed or

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[32] Penhallow v. Doane, 3 Dall. 54, 80 (1795).

[33] Brown v. United States, 8 Cranch 110, 150 (1814).

> regulated; railways taken over and operated by the government; and other drastic powers wholly inadmissible in time of peace exercised to meet the emergencies of war.[34]

Probably a no more comprehensive statement exists concerning the latitude of the powers capable of utilization under the guise of the war powers. To protect the nation, authority is vested in the national government that transcends usual peacetime limitations. The Court has emphasized, however, that these unusual powers are not the product of transient emergencies, but entirely consistent with constitutionalism. Chief Justice Charles Evans Hughes commented:

> The war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.[35]

In essence, as Hughes observed on an earlier occasion, "The power to wage war is the power to wage war successfully."[36]

The Court's generous interpretation of the war powers clothes the federal government with what must be regarded as almost unlimited

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[34] United States v. Macintosh, 283 U.S. 605, 622 (1930).

[35] Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426 (1934).

[36] Charles E. Hughes, "War Powers Under The Constitution," 65th Congress, 1st Session, Senate Ex. Document 105 (Washington, 1917), p. 7.

power. Such prohibitions as exist must be judged in the context of particular cases viewed against the background of the times. From a constitutional standpoint it is equally impressive that the government is given wide discretion in determining the occasion for the use of its powers and the means for the successful accomplishment of its goals. The Court has asserted:

> The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.[37]

And on another occasion the Supreme Court remarked:

> The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers.[38]

These general statements do not, of course, indicate much beyond a recognition of capacious power to deal with problems of national security. But, faced with the cold reality of hostilities, the

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[37] Stewart v. Kahn, 11 Wall. 493, 506 (1870). Compare Justice Story's comment on presidential discretion in Brown v. United States, 8 Cranch 110, 149 (1814). "Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion adopt and exercise, for with him the sovereignty of the nation rests as to the execution of the laws."

[38] Chinese Exclusion Cases, 130 U.S. 581, 606 (1888).

translation of general principles into specific decisions requires the utmost in judicial ingenuity. For more than half a century after the ratification of the Constitution, the war powers lay dormant. While the judiciary faced numerous problems and gradually achieved a position of power in the federal system, growing sectional antagonism precipitated crisis after crisis. The unfortunate performance of the Court in the Dred Scott affair plummeted judicial prestige to new lows by 1860,[39] and perhaps in part explains the relative impotence of the Court during the Civil War. The outbreak of sectional conflict created an environment hardly conducive to judicial detachment. Chief Justice Roger B. Taney, with twenty-five years on the bench in 1861, looked upon the struggle with southern prejudices not always completely disguised.[40] For the time being, however, the Court was to be spared the necessity of ruling on the frequently extreme measures undertaken by the President and Congress.

The Civil War. The attack on Fort Sumter in April 1861 prompted President Lincoln to act with dispatch. Congress was not in session at the time, and Lincoln seemed to prefer this situation, as it left him unhampered and unharassed by Congressional opposition.[41] To meet the emergency the President issued a call for the various state

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[39] Dred Scott v. Sanford, 19 How. 393 (1857).

[40] Carl B. Swisher, Roger B. Taney (New York, 1935), pp. 584-87.

[41] Edward S. Corwin, The President Office and Powers (New York, New York University Press, 1940), p. 156.

militias, as authorized by the Constitution. He took the further step of calling for volunteers to serve in the Union Army, an act of questionable constitutional validity.[42] On April 19, 1861, the President proclaimed a blockade of Alabama, Florida, Georgia, Mississippi, South Carolina, and Texas.[43] On April 27, a second proclamation extended the blockade to Virginia and North Carolina.[44] During this period the President authorized the suspension of the privilege of the writ of habeas corpus. Congress, convening in July 1861 found that it was presented with a fait accompli. Failure to endorse Lincoln's actions would be taken as lack of support for the war. On July 10 the Congress approved the Presidential blockade, and on August 6 executive action taken pursuant to the blockade was sanctioned by Congress.[45] At its summer session Congress gave its approval, retroactively, to most of Lincoln's actions.[46]

One of the most vexatious problems arising out of the Civil War concerned the President's unilateral action in suspending the habeas corpus privilege. The Constitution permits such a step "when in

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[42]Carl B. Swisher, American Constitutional Development (2nd ed., Boston, Houghton Mifflin, 1954), p. 276.

[43]Charles G. Haines, Foster H. Sherwood, The Role of the Supreme Court in American Government and Politics 1835-1864 (Berkeley, University of California Press, 1957), p. 467.

[44]Ibid., p. 468.

[45]Ibid., p. 469.

[46]Swisher, American Constitutional Development, p. 284.

cases of rebellion or invasion the public safety may require it."[47] But it fails to state whether such power belongs to the President or to the Congress. When the national legislature met in July 1861, the President requested approval. Congressional response was indecisive, and nothing was done. Such silence may be significant or it may merely indicate an inability of the majority of Congress to articulate adequately its will.[48] It was not until March 1863, that Congress finally approved the suspension "during the present rebellion."[49]

Judicial opinion on the subject is limited to Chief Justice Taney's celebrated decision in Ex parte Merryman.[50] John Merryman, a Confederate sympathizer in Maryland, had been taken into military custody because of activities inimical to the government. Maryland was one of those areas where the privilege of the writ no longer existed. Taney, on circuit, travelled to Baltimore, heard the case, and issued the writ to be delivered to General George Cadwallader, the military official detaining Merryman. Cadwallader refused to

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[47] Article I, Section 9, Clause 2.

[48] James G. Randall, Constitutional Problems Under Lincoln (Rev. ed., Urbana, University of Illinois Press, 1951), p. 128.

[49] Ibid., p. 130.

[50] Federal Cases No. 9487. Chief Justice Taney stated in part, "I can see no ground whatever for supposing that the President, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power."

honor the writ, and cited the President's order of suspension. Unable to obtain compliance with his order, the Chief Justice nonetheless wrote an opinion rejecting the authority of the President to suspend the privilege of the writ. According to Taney, only Congress might authorize the suspension. Lincoln's reply came in a message transmitted to Congress in which he justified his action. Attorney General Bates presented the legal argument that the President had acted constitutionally in authorizing the suspension.[51] There the matter ended, and the Supreme Court was never afforded the opportunity to rule on the issue.[52]

The first major controversy concerning national security to merit the Supreme Court's attention came in 1863.[53] The Court was asked to rule on the validity of the Presidential blockade of Southern ports. While instituting the blockade, the government contended that such a step did not accord to the rebellious states the status of belligerents. Ordinarily a state of war is a prerequisite to blockade, but no war had been declared. To accept the status of belligerents would doubtless presage foreign recognition, a step which the Union government wished to avoid at all costs. And yet,

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[51] David Silver, Lincoln's Supreme Court (Urbana, University of Illinois Press, 1956), p. 34.

[52] Randall, p. 136. Professor Randall asserts that Taney was probably constitutionally correct in his position that the authority to suspend the privilege of the writ of habeas corpus rests with Congress.

[53] Prize Cases, 2 Black 635 (1862).

without a declaration of war, could there be a legal blockade? When Congress met in July, it had affirmed the President's action. By the narrow margin of 5-4 the Supreme Court approved the blockade as a legitimate exercise of the President's power to suppress insurrection. Justices Samuel Nelson, John Catron, Nathan Clifford, and Chief Justice Taney agreed with their brethren on the legality of the blockade, but they did so only because of Congressional authorization which had taken place on July 13, 1861. In other words, no war had existed within the meaning of the law of nations prior to this time, and, if the law of nations served as the standard, the President's actions were illegal. This liberal interpretation of presidential power seemed to augur of judicial acquiescence in powerful executive leadership.

The problem of raising an army had only been temporarily solved by the President's call for volunteers. On March 3, 1863 Congress enacted the first conscription law in American history. The constitutionality of the law was argued, but never before the Supreme Court. Privately, Chief Justice Taney expressed doubts as to its validity and wrote an unpublished opinion giving his views.[54]

The suspension of certain individual rights in wartime is usually accompanied by efforts to embroil the courts in clashes with military officials. The Civil War was unique in that the battlefield was within the shadow of Washington. Constantly changing military demands

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[54] Randall, p. 274.

placed heavy stress on civil-military relations. The use of military tribunals to try civilians evoked criticism, but there was no judicial interference until the war ended. In many areas martial law and civil law coexisted. Professor James G. Randall has noted:

> Perhaps the typical use of military commissions at the time of the Civil War was for the punishment of offenses coming broadly under the military code when committed by civilians in regions hostile to the United States.[55]

Clement Vallandigham, a democratic congressman from Ohio, helped gain notoriety for himself and for the whole question of military-civil jurisdiction in the early days of the war. The congressman was particularly vocal in his opposition to the Lincoln administration. Vallandigham, on one occasion, declared that "the present war was a wicked, cruel and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing our liberty and to erect a despotism."[56] These comments and other equally inflammatory resulted in Vallandigham's arrest by military officials. Subsequently he was tried and convicted before a military commission, and the sentence prescribed incarceration for the duration of the war. Vallandigham contended that he had been illegally detained and illegally tried. Moreover, the commission had lacked jurisdiction.[57] The civil

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[55] Ibid., p. 175

[56] Silver, p. 147.

[57] Ex parte Vallandigham, 1 Wall. 243 (1864).

courts refused to intervene, and the Supreme Court disposed of the request for a writ of habeas corpus by pleading lack of jurisdiction. Lincoln later allowed Vallandigham to be freed, and he was exiled to the Confederacy. Eventually he spent a period of time in Canada before he was allowed to return to Ohio. His later criticisms of the war were for the most part ignored.[58]

By far the most significant case involving the extent of jurisdiction possessed by military tribunals reached the Court after the termination of hostilities.[59] The much heralded Milligan decision is noteworthy for two reasons. First, it represents the attempt by the Court to establish a clear demarcation between military and civil authority in time of war. Secondly, it marks a resurgence of judicial activism in the area of national security after a period of quiescence during the war. The facts of the case are these: Lambdin P. Milligan, a civilian resident of Indiana, was arrested and tried before a military tribunal on charges of conspiracy against the United States. Conviction was obtained and the verdict was a sentence of death. Basically, Milligan contended that, as a civilian, trial by military commission was unauthorized and violative of his constitutional rights. He further asserted that, since the civil courts were open and operating in Indiana at the time of his arrest, they constituted the appropriate agency for hearing his case. His petition for a writ of

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[58] Haines and Sherwood, p. 487.

[59] Ex parte Milligan, 4 Wall. 2 (1866).

habeas corpus was argued before the Supreme Court upon certification from the Circuit Court. Justice David Davis phrased the central issue in this way:

> The controlling question in the case is this. Upon the facts stated in Milligan's petition and the exhibits filed, had the military commission mentioned in it jurisdiction legally to try and sentence him.[60]

Jurisdiction would depend on the presence of martial law in Indiana, and its validity, and also on whether Congress had authorized, or could authorize, trials of this type before military commissions. The Court submitted that civil courts were operating unimpaired at the time of Milligan's arrest, and they rejected the contention that martial law provided justification. Davis asserted:

> Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.[61]

Then followed the most pronounced statement of judicial absolutism to issue from the Court during this period. "Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction."[62] Milligan had, therefore, been illegally tried. On this point the Court was unanimous. Four

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[60] Ibid., p. 118.

[61] Ibid., p. 127.

[62] Ibid.

justices, however, were reluctant to subscribe to the far-reaching statements of the majority. While conceding the lack of congressional authorization for this particular trial, they did not believe that Congress was foreclosed from taking such a step "in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals."[63] To the minority the fact that the courts were open and operating did not remove this power from Congress. The remarkable aspect of the majority opinion was its willingness to assert such a broad doctrine when the case would have been decided on the very narrow grounds selected by the minority. One can surmise the reasons: a zealous desire to establish firmly individual liberty in time of war, and perhaps the calmer atmosphere prevailing now that the threat to the nation's security had been removed. Those who hold to the latter opinion sometimes cite the similarities in the Vallandigham and Milligan cases, and suggest that the time element is the main distinction. The former was decided during the war, the latter afterwards.[64]

Except for the Milligan decision, there is little evidence to support the thesis of an active judiciary during the Civil War, at least insofar as the Supreme Court was called upon to review questions relating to national security. Perhaps it is even fallacious to suggest that the Court truly established a defined role vis-à-vis the

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[63] Ibid., p. 140.

[64] Randall, p. 176.

political branches of the government. Yet the absence of judicial review is likely to enhance the development of a strong and viable conception of the powers of the national government in times of stress.

At the end of the Civil War sectional disputes were mostly forgotten, and the Court turned its attention to the application of a peacetime constitution to an expanding federal government and economy. The war powers were largely unnoticed in the glare of other judicial controversies. The Spanish-American conflict of the closing years of the century was so brief that its impact was hardly felt. It produced no further amplification of the powers of the government with respect to national security.

World War I. The First World War presented the Supreme Court with a new conception of war and manifold problems of national security. For the first time in American history the nation was involved in a major global conflict requiring the full utilization of its human and economic resources. The impact of war was not isolated to the battlefield, but extended to almost all segments of American life. Two distinct dimensions were added to the powers claimed by the federal government -- economic mobilization and governmental regulation, combined with legislative curtailment of individual liberty. The problems may have been different from those confronting the Lincoln administration, but in most respects the justifications were similar, necessity, successful prosecution of the war, and a flexible interpretation of the Constitution. And circumstances inevitably dictated

judicial pronouncement on the validity of governmental measures.

At least one issue from the Civil War period remained unresolved; it concerned the constitutionality of conscription. On May 18, 1917, the Congress passed the Selective Service Act.[65] All men between the ages of twenty-one and thirty were to be registered and classified for military service. Despite the constitutional objections raised, a unanimous Court, speaking through Chief Justice Edward D. White, upheld the Act.[66] Article I, Section 8 gave Congress the power to raise an Army, and the Court would not deny that branch the means for implementation of that power.[67] Thus Congress was free to use appropriate means for raising an army and to make rules and regulations for the control and welfare of the armed services, even to the extent of suppressing houses of prostitution in the vicinity of army camps.[68] It also comprehended conscription for foreign service.[69]

At least three pieces of legislation indicated the scope of governmental control of the wartime economy. The Lever Act of August

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[65] 40 Stat. 76 (1917).

[66] Selective Draft Law Cases, 245 U.S. 366 (1917).

[67] Three main arguments were used by those who attacked the constitutionality of the draft laws. (1) The law interfered materially with the State's control over its militia. (2) The legislation infringed freedom of religion. (3) The Act violated the Thirteenth Amendment's bar against involuntary servitude. All three contentions were dismissed by the Supreme Court.

[68] McKinley v. United States, 249 U.S. 397 (1919).

[69] Cox v. Wood, 247 U.S. 3 (1918).

10, 1917 gave the President authority to take steps to preserve food and coal supplies for the war effort.[70] Among other things the chief executive was empowered to regulate distribution and to fix prices. The Act forbade the use of foodstuffs in the manufacture of distilled liquor. On October 6, 1917 the Trading-with-the-Enemy Act vested authority in the President to establish embargoes on imports, set up a system of censorship on information passing to foreign countries, and created the Office of Alien Property Custodian.[71] Finally, the President was granted discretionary powers to take possession of any transportation system deemed essential to the national security.[72]

On December 26, 1917 President Woodrow Wilson, by executive proclamation, took control of the railroads, telephones, and telegraph lines, and water systems of transportation.[73] Operation of the railroads was placed in the hands of a director general, and suitable compensation to the railroads was to be provided. Similarly, control over telephone and telegraph lines was vested in the Postmaster General. Both officials could determine rates. The constitutionality of these various acts was accepted by the Supreme Court with only slight elaboration. It was contended that the exercise of the war

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[70] 40 Stat. 276 (1917).

[71] 40 Stat. 411 (1917).

[72] 39 Stat. 645 (1916).

[73] 40 Stat. 1733 (1917).

powers justified government operation of the railroads. Such control extended to the regulation of intrastate as well as interstate rates, state objections to the contrary notwithstanding.[74] Chief Justice White found arguments of federalism of small value in affirming the powers of the federal government in this field. "The complete and undivided character of the war power of the United States is not disputable,"[75] the jurist remarked. The same was true of the regulation of intrastate telephone rates.[76]

The Court, on other occasions, sustained the validity of measures infringing property rights. Prohibition on the production of intoxicating liquors was upheld in Hamilton v. Kentucky Distilleries.[77] During the same term the Court refused to contest the power of Congress to extend this prohibition to the manufacture and sale of non-intoxicants.[78] In Block v. Hirsh,[79] Justice Oliver Wendell Holmes, speaking for the Court, swept aside constitutional objections to a system of rent control established by federal law. In none of the

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[74] Northern Pacific Railroad v. North Dakota, 250 U.S. 135 (1919).

[75] [74] Northern 149.

[76] Dakota Central Telephone Company v. State of North Dakota, 250 U.S. 164 (1919); Kansas v. Burleson, 250 U.S. 188 (1919); Burleson v. Demcy, 250 U.S. 191 (1919); MacLeod v. New England Telephone and Telegraph Company, 250 U.S. 195 (1919).

[77] 251 U.S. 146 (1919).

[78] Jacob Ruppert v. Caffey, 251 U.S. 264 (1919).

[79] 256 U.S. 135 (1921).

cases already cited did the Court impair, or attempt to impair, the operations of the President and Congress. Many opinions were brief, and constitutional issues were disposed of with dispatch. Economic interests, ordinarily the recipient of special judicial protection, were forced to surrender their privileged position in response to paramount national interests. That a predominantly conservative Court could sanction these unusual invasions of property rights is convincing evidence of the elasticity of the war powers.

In the years following World War I a series of cases came to the Court involving the Espionage Act.[80] This measure had been passed by Congress in 1917 to curb the use of non-conformist free speech which interfered with the prosecution of the war, or materially harmed the morale of the nation's fighting forces. In scope this law placed stringent limitations on freedom of expression and touched upon one of the basic guarantees of human liberty found in the American Constitution. Three types of speech were proscribed under the terms of the Espionage Act -- statements false in nature that interfered with military or naval operations; efforts to encourage insubordination, disloyalty, or refusal of military service; and any attempt to interfere in programs of enlistment or recruitment. The Sedition Act, passed in 1918, went even further by making it unlawful to utter "disloyal, profane, scurrilous, or abusive language" about the American Constitution, flag, military forces, or in any way to urge the

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[80] 40 Stat. 217 (1917).

curtailment of production.[81] The legislation was not unlike the earlier Alien and Sedition Acts of the Adams' administration. Governmental officials were thus clothed with power to restrict statements considered detrimental to national security.

Judicial affirmation of the validity of the Espionage Act came a few months after the war ended.[82] Justice Holmes spoke for a unanimous Court and sustained the conviction of Schenck and others for printing pamphlets purposefully intended to incite insubordination in the military forces and obstruct recruitment and enlistment. In assessing the extent of control over speech that the government may legitimately exercise under its powers to protect the nation, Holmes fashioned the "clear and present danger test."

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.[83]

Apparently the Court was willing to admit congressional power to regulate speech while arrogating to itself the right to determine

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[81] 40 Stat. 533 (1918).

[82] Schenck v. United States, 249 U.S. 47 (1918).

[83] Ibid., p. 52.

when individual violations reached or stepped over the line of "clear and present danger." Holmes had coined a phrase, but he had not provided a formula for the determination of what constituted "clear and present danger." A week later in Debs v. United States,[84] speech was again held to be in violation of the Espionage Act. Subsequent decisions of the Supreme Court invariably held for the government and against the individual. The "clear and present danger" test was largely ignored over the dissents of Holmes and Louis Brandeis in favor of a less rigid formula in behalf of the government.[85]

While the Supreme Court expanded its modus operandi during World War I, it was largely in the cases it accepted for review. The increase in the centralization of power in the hands of the President and Congress went unchecked. During the war itself the judiciary had no opportunity for acting on the unprecedented growth of governmental power. In those cases decided after the war, an acquiescent Court gave carte blanche to many of the programs instituted during the conflict. Professor Clinton Rossiter has described the post-war decisions:

> In a number of other decisions after the war a latitudinarian conception of the Constitution-at-war was manifested, and in no case did the Court intimate

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[84] 249 U.S. 211 (1918).

[85] Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1919); Pierce v. United States, 252 U.S. 239 (1919).

that the tremendous wartime delegations of power had been unconstitutional.[86]

Summary. On the eve of the outbreak of World War II the weight of judicial precedent furnished the political branches of government virtually unlimited powers to cope with threats to the national security. Judicial interpretation refused to disallow the rule of law or to waive the Constitution as an instrument for war as well as for peace. But it was manifestly evident that self-preservation called into being the preponderance of the nation's resources, and permitted unusual and unprecedented governmental authority. These resources were to be adapted with the greatest amount of flexibility, and the discretionary powers of the federal government were not insubstantial.

It was not strange, therefore, that the Supreme Court failed to construct a systematic conception of national security. The Court doubtless saw its role as the conservator of the Constitution. But it was a Constitution broadly conceived, and, therefore, purposely to be broadly construed, especially in cases involving national security. In retrospect, the character of decisions issuing from the Court were not infrequently colored by the gravity of the situation confronting the nation. Its task was made no easier by its lack of intimate participation in policy making, and the ubiquitous restraints incorporated in the Constitution of a democratic society.

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[86]Clinton Rossiter, Constitutional Dictatorship (Princeton, Princeton University Press, 1948), p. 254.

CHAPTER II

PROPERTY RIGHTS

Perhaps the most significant change in warfare in the last fifty years has been the total involvement of the nation in all aspects of the struggle for national security. Total war in the twentieth century demands the utilization of the full resources of the nation, human and economic, in the name of national security. Rapid advances in technology and scientific achievement have unleased new weapons of mass destruction. Mobilizing the domestic economy for total war has resulted in new stresses and strains on private property. Since 1940 the federal government has inaugurated extensive programs of economic mobilization. These comprehensive and detailed regulations have inevitably impinged on private interests and embroiled the Supreme Court in the task of reconciling property rights with national security.

The institution of private property has historically been the recipient of special judicial protection. During the first three decades of the twentieth century, government efforts at regulating property in the public interest were repeatedly frustrated by the judiciary. A conservative Court used such devices as "businesses

affected with a public interest"[1] and "liberty of contract"[2] to emasculate key economic legislation. By 1937, however, internal and external pressures on the Court had culminated in a more flexible judicial philosophy and marked the end of judicial interference in governmental economic policy.

Thus, in many respects the judicial battles of the 1930's had resolved constitutional questions concerning property rights. New assaults on economic interests after 1940 were made in a climate of judicial flexibility and combined with the overriding emergency of World War II, it could hardly be expected that the Supreme Court would offer serious or sustained objections to governmental policy. Congress and the President moved with harmony and dispatch to enact and implement programs for civilian mobilization. Yet, even in war, litigation commences with the promulgation of programs curtailing property rights. The constitutional protection of property is not absolute, and emergencies, of whatever character, permit of limitations in the public interest.[3]

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[1] Charles Wolff Packing Company v. Court of Industrial Relations, 262 U.S. 522 (1923); Tyson v. Banton, 273 U.S. 418 (1927); New State Ice Company v. Liebmann, 285 U.S. 262 (1932). This doctrine was discarded by the Court in Nebbia v. New York, 291 U.S. 502 (1934).

[2] Lochner v. New York, 198 U.S. 45 (1904); Adkins v. Children's Hospital, 261 U.S. 587 (1922). Compare West Coast Hotel Company v. Parish, 300 U.S. 379 (1937), which overruled the Adkins decision, and eliminated "liberty of contract."

[3] Fifth Amendment, Fourteenth Amendment: "No person shall be deprived of life, liberty or property without due process of law." Also the Fifth Amendment, "Nor shall private property be taken for public use, without just compensation."

National security implies more than military mobilization. As Justice Wiley Rutledge remarked:

> We cannot now, as always heretofore, meet war with only military mobilization. Civilian as well as soldier is mobilized, and must be. Farm, factory, shop, ship and all of significant civilian life has become as essential to fighting as Army and Navy. The old unaffected or little affected areas and regions of civilian activity have gone.[4]

As broad as governmental power is when dealing with the economy, it is not unlimited. Programs were devised so as to retain as much individual freedom as was consistent with wartime needs. Numerous cases came to the Supreme Court, some embodying major constitutional questions, others presenting minor procedural matters. It should be noted at the outset that large segments of the government's programs passed without Court review. Judicial pronouncements were confined to a few significant issues, and to much else that must be regarded as trivial insofar as it related to a basic interpretation of national security. Discussion will be restricted to the role the Court played, thereby omitting from consideration the programs and policies that did not elicit controversies reaching the Supreme Court.

Price Control. War tends to accelerate prices, and, unless checked, their indiscriminate rise can result in inflation. During World War I no statutory authority had existed to permit the

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[4]Wiley B. Rutledge, "A Symposium on Constitutional Rights in War Time," Iowa Law Review, 29 (1944), 380.

establishment of price controls, although voluntary agreements were concluded, and the threat of indirect sanctions eventuated in moderately successful price control.[5] In 1941 President Franklin D. Roosevelt, in a message to Congress, stressed the harmful effects of inflation in wartime. He requested the passage of legislation enabling the government to control prices, fix rents, and allocate scarce materials.[6] On January 30, 1942, Congress enacted the Emergency Price Control Act.[7] The price administrator was authorized to fix maximum prices "as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act."[8] A similar authority was given to establish rent regulations.[9] Legal sanctions were incorporated in the Act in the event that violations of price and rent regulations occurred. Realizing that a program that would make such extensive inroads into property rights would produce frequent complaints, Congress formulated a system of administrative review. Once a price regulation was announced, interested parties were permitted to file protests with the Office of Price Administration. It was incumbent on the administrator to weigh the complaint,

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[5] "American Economic Mobilization," Harvard Law Review, 55 (1941-42), 482.

[6] H. R. Rep. No. 1409, 77th Congress 1st Session (1941).

[7] 56 Stat. 23 (1942).

[8] Section 2(a).

[9] Section 2(b). "The administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable."

including the evidence that was introduced seeking to overturn the regulation. If the price administrator acted adversely, the claimant could seek further review. The Emergency Court of Appeals was vested with exclusive jurisdiction to hear complaints rejected by the price administrator. After the Emergency Court of Appeals only the Supreme Court remained. Federal district courts were permitted to intervene in the process only to the extent of enforcing compliance with price regulations. Congress expressly withdrew the Court's jurisdiction to enjoin enforcement of price regulations.

In Lockerty v. Phillips[10] the Court gave its approval to this provision. Chief Justice Harlan F. Stone observed that "there is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular federal court."[11] The law did not, however, preclude the Supreme Court from determining "whether any regulation, order, or price schedule promulgated under the Act is not in accordance with law, or is arbitrary or capricious."[12] The constitutionality of price control was established in Yakus v. United States.[13] The petitioners had been convicted of selling beef above the maximum prices prescribed. During their trial in the district court they sought to introduce evidence pertaining to the validity of

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[10] 319 U.S. 182 (1942).

[11] Ibid., p. 187.

[12] Ibid., p. 189.

[13] 321 U.S. 414 (1943).

the regulation, but such evidence was excluded. Before the Supreme Court the petitioners assailed the price control program on several grounds. First, it involved an unconstitutional delegation of legislative power. Secondly, petitioners questioned whether Section 204(d) of the Act was meant to prevent the introduction of evidence relevant to determining the validity of price regulations in criminal prosecutions for their violation. If such were true the petitioners argued that this interpretation constituted a violation of the Sixth Amendment and worked "an unconstitutional legislative interference with the judicial power."[14] Finally, petitioners asserted that the mode of administrative and judicial review failed to meet the demands of due process of law.

All of these contentions were rejected. Significantly, the power of Congress to set commodity prices as an incident of the war powers was accepted by all the justices. Only with respect to the procedures in the 1942 Act was there disagreement. The Court was of the opinion that sufficient standards had been devised by Congress to avoid an unconstitutional delegation of legislative power:

> Only if we could say that there is an absence of standards for the guidance of the administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.[15]

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[14] Ibid., p. 418.

[15] Ibid., p. 426.

The Court viewed the exclusion of evidence relating to the validity of price regulations as a proper construction of the Act and within the constitutional power of Congress to control the jurisdiction of inferior courts. The administrative review satisfied the standards of due process so long as fair hearings were conducted. The prohibition of injunctive relief did not constitute an impairment of due process:

> Where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the Court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.[16]

Justice Owen Roberts dissented, as did Justice Rutledge, joined by Justice Frank Murphy. The latter two denounced the doctrine that courts must enforce regulations without the corresponding authority to inquire into their validity. They maintained:

> If in one case Congress thus can withdraw the validity of the regulations on which the charge is based, it can do so for other cases unless limitations are pointed out clearly and specifically.[17]

Thus, Congress's program to prevent wartime inflation passed the Supreme Court unscathed. The regulation of prices as a constitutional power was accepted by a unanimous Court; in fact, it received only

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[16] Ibid., p. 440.

[17] Ibid., p. 483.

scant attention. The points raised by the dissenting justices concerning procedural defects in the law did not unduly concern the majority. Measured by standards of inconvenience, the whole Act placed burdens on individuals and necessitated certain obvious economic sacrifices. Procedural standards may have been more inflexible than is usually the case, but the majority accepted the unusual conditions that warranted this action.

The disposition of constitutional issues concerning price control settled the power of the national government to take appropriate action to prevent an inflationary rise in prices. The application of the statute in response to individual circumstances accounted for additional litigation before the Court. The demands of a federal system confronted the judiciary with two levels of price control and their relationship. The states on occasion instituted price ceilings as a concomitant of the states' police powers. When price ceilings affected sales to the national government, the matter of burden on the latter became a question of importance. In 1943 the Court upheld a Pennsylvania regulation of prices for the sale of milk to the United States government within the territorial limits of Pennsylvania.[18] The same day the Court invalidated a similar California regulation applied to sales to a military installation under the jurisdiction of the United States.[19] The distinguishing point in the

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[18] Pennsylvania Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1942).

[19] Pacific Coast Dairy v. Department of Agriculture of California, 318 U.S. 285 (1942).

two cases rested on the presence in one and absence in the other of the exclusive jurisdiction of the United States; yet in both cases the Court recognized the authority of Congress to modify this procedure to fit whatever pattern it deemed advisable. Thus, there was no incompatibility between state and federal regulations so long as the former avoided extension of these controls to areas under the exclusive jurisdiction of the United States. State immunity from federal price controls was not permissible according to the Court's reading of the Emergency Price Control Act. This act referred to the regulation of the price of commodities sold by "any person." With only Justice William Douglas dissenting, the Court construed this phrase to apply to sales by a state[20] or county,[21] the provisions of the state constitution in the former to the contrary notwithstanding. The Court merely pointed to its Yakus decision in rejecting claims of unconstitutionality.

Even at the federal level disputes arose concerning price regulations. Specifically, the Price Control Act of 1942 had exempted common carriers and public utilities from regulation by the price administrator. The judiciary asserted that it was Congress's intent to exclude rate regulations by the wartime agency, since existing machinery was already present for such regulation. Consequently, when the price administrator sought to regulate the prices of a

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[20] Case v. Bowles, 327 U.S. 92 (1945).

[21] Hulbert v. Twin Falls County, 327 U.S. 103 (1945).

warehouse declared by state law to be a public utility, the Court accepted the state's determination, and denied the authority of the price administrator to intervene.[22] A new dimension was added to the question of rate regulation by the passage of the Inflation Control Act of 1942.[23] Under its terms no rate increases could be made without thirty days prior notice to the President in order to permit governmental intervention in the case. Subsequently, the price administrator challenged rate increases for a gas light company before the Public Utilities Commission. The latter held a new hearing, but rejected the administrator's arguments against the advisability of the rate increases. The Supreme Court found that a fair hearing had been conducted, and because the regulation of rates was not within the province of the Office of Price Administration, the rates were allowed to stand.[24] Two months later the Court sustained another increase in rates granted to common carriers.[25] Again the majority rejected the contention that there was an absence of a fair hearing. Concerning the assertion by the government that the Interstate Commerce Commission had failed to take proper notice of the views of the price administrator regarding possible inflationary effects of higher rates, Justice Robert Jackson observed:

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[22] Davies Warehouse Company v. Bowles, 321 U.S. 144 (1943).

[23] 56 Stat. 765 (1942).

[24] Vinson v. Washington Gas Light Company, 321 U.S. 489 (1943).

[25] I.C.C. v. Jersey City, 322 U.S. 503 (1943).

> The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded to some factors in relation to others.[26]

The Supreme Court also had to review specific regulations arising out of various situations calling for Court interpretation. The practices were numerous and involved a diversity of problems. For example, a common practice of price fixing was to base a price regulation on a specific period. Subsequent ceiling prices would correspond with the highest price charged during the base period. The Court ruled that the highest price charged meant the price of commodities delivered -- not a price contracted for goods not delivered.[27] Frequently, to avoid price control, retailers would resort to what is known as combination sales. This practice involves attaching two or more products and requiring the purchaser to accept both items in order to gain either. The Price Control Act forbade such procedures where the secondary products were worthless. When the secondary products had value, the Court reversed a conviction based on the use of combination sales.[28] One criterion for fixing prices was to rely on standardization when determined necessary.[29] This particular

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[26] Ibid., p. 522.

[27] Bowles v. Seminole Rock and Sand Company, 325 U.S. 561 (1944).

[28] Kraus Brothers v. United States, 327 U.S. 614 (1945).

[29] Thomas Paper Stock Company v. Porter, 328 U.S. 50 (1945).

litigation involved a suit for treble damages for the sale of waste paper during the period July 16, 1943, to September 11, 1943. On that date standardization had been declared the only feasible method of price regulation. The Court, in dealing with another case concerning waste paper, found that the evidence was sufficient to sustain a lower court conviction growing out of a charge of upgrading waste paper to secure added financial gain.[30]

The time element evoked disputes relating to price regulation. The Court held that the revocation of a maximum price ceiling did not preclude an indictment for violation of the regulation while it was in force.[31] In a similar action the Court ruled that the right of protest was not restricted to price schedules that were currently in effect.[32] This decision came subsequent to a 1944 amendment to the Price Control Act that abrogated the time limit on protests against price regulations.[33] Simultaneously, the Court denied that permission to file a complaint in the Emergency Court of Appeals after an earlier denial rendered the case moot.[34]

The Price Control Act permitted the price administrator to seek an injunction against persons guilty of violating price regulations.[35]

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[30] United States v. Bruno, 329 U.S. 207 (1946).

[31] United States v. Hark, 320 U.S. 531 (1943).

[32] Utah Junk Company v. Porter, 328 U.S. 39 (1945).

[33] Stabilization Act of 1944, 58 Stat. 632, Sec. 106 (1944).

[34] Collins v. Porter, 328 U.S. 46 (1945).

[35] Sec. 205 (a).

A Washington department store unwittingly charged prices in excess of maximum price schedules. On discovering its error, the store rectified the situation, but, because of the complexities of the price regulations and the size of the store, several violations occurred. In reversing the Court of Appeals' affirmation of the price administrator's complaint, the Court contended that the exercise of the equity power was not mandatory, and the Courts could use some discretion.[36]

Various miscellaneous issues have required judicial clarification. The Court has upheld the authority of the price administrator to delegate authority to district directors to issue subpoenas,[37] and has sustained the right of the President to substitute the United States as the plaintiff in actions relating to the violations of price controls.[38] No immunity results from prosecutions based on information obtained from records kept in compliance with the Act of 1942,[39] but the high tribunal has allowed the claim of immunity from prosecution based on testimony given before the Office of Price Administration.[40]

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[36] Hecht Company v. Bowles, 321 U.S. 321 (1943).

[37] Fleming v. Mohawk Company, 331 U.S. 111 (1945).

[38] United States v. Allied Oil Corporation, 341 U.S. 1(1950).

[39] Shapiro v. United States, 335 U.S. 1 (1947); United States v. Hoffman, 335 U.S. 77 (1947).

[40] Smith v. United States, 337 U.S. 137 (1948).

Rationing. An essential feature of the government's program of economic mobilization included the allocation of scarce materials, more commonly known as rationing. The Second War Powers Act contained provision for allocation with authority vested in the President.[41] Subsequently, the chief executive delegated these duties to the Office of Price Administration. General policy was dictated by this agency, while execution was carried out at the local levels through rationing boards appointed by the governors of the respective states.[42] The power of allocation carried with it the authority of suspension. This procedure stipulated that individuals guilty of the infractions of rationing regulations might be prohibited from any future right to use, sell or dispose of rationed products. The power of suspension was challenged before the Court, but eight justices asserted that the authority to issue suspension orders was granted in the Second War Powers Act.[43] Even though the constitutionality of this allocation program was left undetermined, nothing can be inferred from the opinion to cast doubt on its validity.

Rent Control. At the same time that it instituted a program of price control, Congress also provided for the regulation of rents. In substance the procedures for controlling rents resembled those provided for price control. The scarcity of housing, together with

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[41] 56 Stat. 178 (1942).

[42] Reuben Oppenheim, "The War Price and Rationing Boards An Experiment in Decentralization," Columbia Law Review, 43 (1943), 151.

[43] L. P. Steuart and Brothers, Inc. v. Bowles, 322 U.S. 398 (1943).

the inflationary effects of unregulated rents, made federal control imperative. In Bowles v. Willingham[44] the Supreme Court sustained the validity of the rent provisions of the price control act. The respondent in the instant case had obtained a temporary stay of federal rent regulations in a state court. Thereupon, the price administrator intervened in the federal district court. The latter invalidated that portion of the Price Control Act dealing with rent control, and the case was appealed to the Supreme Court. With Justice Roberts dissenting, the Court rejected the contention that the district court lacked jurisdiction to stay state court proceedings in which laws of the United States were involved. The high tribunal reasoned that the challenged provisions did not result in an unconstitutional delegation of legislative power. "Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority."[45] As in the Yakus case, the establishment of administrative review after the issuance of regulations conformed with due process:

> Where Congress has provided for judicial review after the regulations or orders have been made effective, it has done all that due process under the war emergency requires.[46]

Justice Rutledge concurred but expressed concern that district courts

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[44] 321 U.S. 503 (1943).

[45] Ibid., p. 515.

[46] Ibid., p. 521.

might be compelled to authorize sanctions to legislative and administrative commands regardless of their constitutionality. Justice Roberts considered the whole program deficient as an unconstitutional delegation of legislative power. He remarked, "It is plain that this Act creates personal government by a petty tyrant instead of government by law."[47]

Federal district court jurisdiction with respect to the implementation of rent controls required Supreme Court clarification in several instances. In Porter v. Lee[48] the high tribunal upheld the right of a district court to grant stays affecting state court proceedings. A state judgment for eviction had been obtained in contravention of rent control regulations. On the same day the Court reaffirmed district court jurisdiction.[49] The respondents here relied on Section 265 of the Judicial Code, which prohibited federal court stays of proceedings commenced in state courts. A unanimous Court construed Section 205 of the Emergency Price Control Act as a legislative amendment to the judicial code granting exceptions under these circumstances. Following the expiration of rent controls in 1947, the Court, citing its Yakus decision, held that district court review of rent orders was precluded by Congress.[50] The Emergency Court of

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[47] Ibid., p. 537.

[48] 328 U.S. 246 (1945).

[49] Porter v. Dicken, 328 U.S. 252 (1945).

[50] Woods v. Hills, 334 U.S. 211 (1947).

Appeals retained "jurisdiction to review rent orders issued under the Price Control Act by means of the protest and complaint procedure of Section 203(a) and 204(a)."[51] However, the federal courts did possess the power to grant restitution in cases of overcharges of rent as a part of its equitable jurisdiction.[52]

Subsequent to the termination of rent controls on June 30, 1946, but prior to the effective date of extension on July 25, 1946, certain landlords obtained a state court judgment in eviction proceedings. The extension act of July 25, 1946, contained a section making its provisions retroactive to June 30, 1946. A district court declared this section unconstitutional. The controversy reached the Supreme Court in Fleming v. Rhodes.[53] Eight justices were in agreement that the lower court decision should be reversed. Their contention was that "federal regulation of future action based on rights previously acquired by the person regulated is not prohibited by the Constitution."[54]

Procedural aspects of rent control have accounted for additional Court pronouncements. Tenants within the meaning of rent legislation are "subject to" orders and hence may file a protest with the

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[51] Ibid., p. 217.

[52] Porter v. Warner Holding Company, 328 U.S. 395 (1945); United States v. Moore, 340 U.S. 616 (1950).

[53] 331 U.S. 100 (1946).

[54] Ibid., p. 107.

price administrator.[55] The judiciary has maintained that the Statute of Limitations "began to run on the date that a duty to refund was breached."[56] Finally, the highest tribunal ruled that rent regulation promulgated for the District of Columbia did not apply to the United States, the landlord of government-owned defense housing.[57]

Does the termination of hostilities bring to an end the exercise of the war powers as a basis of legislation? At least one district court, in thinking so, invalidated rent regulations enacted subsequent to the end of actual fighting. In Woods v. Miller[58] the Court reversed this holding, and contended that conditions created by the war could be dealt with through the war powers, even though hostilities had ceased, or, as the Court phrased it, "to treat all the wounds which war inflicts on our society."[59] This reasoning disturbed Justice Jackson, even though he concurred in the Court's decision: "I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent — as permanent as war debts."[60] The only safeguard suggested by the Court was to suppose that Congress would rely on its constitutional

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[55] Parker v. Fleming, 329 U.S. 531 (1946).

[56] Woods v. Stone, 333 U.S. 472, 478 (1947).

[57] United States v. Wittek, 337 U.S. 346 (1948).

[58] 333 U.S. 138 (1947).

[59] Ibid., p. 144.

[60] Ibid., p. 147.

responsibilities. The extreme judicial self-restraint evinced in this opinion seems to underscore the contention that legislation enacted during the exigencies of war may extend for an unspecified period, even in peacetime. In retrospect the Court was apparently well advised in its faith in Congress. But the judicial doctrine expounded furnishes precedent for future use, and virtually eliminates effective judicial checks.

A review of the various cases concerning price and rent control and rationing provides impressive confirmation of the widespread powers of the federal government. On one occasion the Court expressed its view in these words:

> We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort.[61]

As far as Congress had gone the Court could find no basic constitutional objection. National security was imperiled, and on the home front sanctity for private property gave way to the requirements of full-scale economic mobilization. The Court's task was unquestionably made easier by Congress's desire to retain traditional procedures wherever possible. The nation's highest tribunal would not counsel interference in the substantive provisions of price and rent regulation, but it could and did insist on compliance with due process.

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[61] Bowles v. Willingham, 321 U.S. 503, 519 (1943).

Renegotiation. Not the least of the problems confronting the government in its effort to install an effective check rein on the domestic economy in wartime was the issue of excess profits. Two ill effects flow from exorbitant profits in war: inflation and damage to the morale of the population. Yet, to destroy the profit motive entirely threatens expanded production, the cornerstone of a wartime economy. The alternative is government operation of basic industries, a scheme inimical to a free economy, even in times of emergency. In previous wars the efforts to initiate successful checks on disproportionate profits had met with only limited success.[62] A contract dispute before the Court in 1942, growing out of World War I contract arrangements crystallized the problem.[63] In upholding profits claimed by a private industry against the government, the judiciary nevertheless expressed clear governmental authority for civilian mobilization:

> Under this authority (power to raise an Army) Congress can draft men for battle service. Its power to draft business organizations to support the fighting men who risk their lives can be no less.[64]

The Court then referred to the various procedures utilized in the past to combat excess profits:

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[62]David I. Walsh, "War Profits and Legislative Policy," University of Chicago Law Review, 11 (1943-44).

[63]United States v. Bethlehem Steel Corporation, 315 U.S. 289(1941).

[64]Ibid., p. 305.

> The problem of war profits is not new. In this country every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized. . . . To meet this recurrent evil Congress has at times taken various measures. It has authorized price fixing. It has placed a fixed time limit on profits, or has recaptured high profits through taxation. It has expressly reserved for the Government the right to cancel contracts after they have been made. Pursuant to congressional authority, the Government has requisitioned existing production facilities or itself built and operated new ones to provide needed war materials.[65]

The basic formula selected by Congress at the outset of the Second World War for wartime contracts was renegotiation. In essence, this device furnished a method whereby each government contract might later be re-examined in the light of existing conditions. Under such circumstances it was hoped that this practice would effectively eliminate the bulk of excess profits. These provisions, along with the necessary administrative machinery, were incorporated in the Renegotiation Act of 1942,[66] as later amended by the Renegotiation Act of 1943.[67] Actually these acts represented a far less drastic solution than might have been adopted. Profits were not to be totally surrendered, but the government was to be spared unreasonable costs, which in turn might produce excessively high profits. The detrimental effects would very likely carry over into prices and

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[65] Ibid., p. 309.

[66] 56 Stat. 226, 245-46 (1942).

[67] 57 Stat. 347 (1943).

wages. Nonetheless, judicial intervention at some stage could be expected. What is remarkable is that the participation of the Supreme Court was limited to three cases. Two of these were dismissed without touching the question of constitutionality because of the failure to exhaust administrative remedies.[68] Three years following the end of the war a unanimous Court, speaking through Justice Harold Burton, upheld the constitutionality of the Renegotiation Act.[69] The Court contended that Congress had acted in pursuance of the war powers. In rejecting claims of an unconstitutional delegation of legislative power and denial of due process, Burton conceded the wide latitude of permissible governmental operations:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security, and life, itself.[70]

Certainly if Congress may use the war powers to mobilize the civilian population, it is not to be denied the appropriate means that are "necessary and proper" for achieving its goal:

> Not only was it "necessary and proper" for Congress to provide for such production in the successful conduct

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[68] Mine Safety Applicances Company v. Forrestal, 326 U.S. 371 (1945); McCauley v. Waterman S.S. Corporation, 327 U.S. 540 (1945).

[69] Lichter v. United States, 334 U.S. 742 (1947).

[70] Ibid., p. 754.

> of the war, but it was well within the outer limits of the constitutional discretion of Congress and the President to do so under the terms of the Renegotiation Act.[71]

Confiscation. Price and rent control as well as renegotiation represent some facets of governmental regulatory powers permissible for the protection of the national security. At times, however, pressing wartime needs necessitate a more direct exercise of power -- the outright confiscation of private property for military purposes. Such seizures are clearly constitutional so long as adequate compensation is provided, and so long as the taking of private property is for public use. The latter consideration lies within the discretion of Congress,[72] but resolving the question of just compensation is a proper judicial function.[73] At no time during the war did the Court manifest any inclination to interfere with governmental seizure. But the Court did address itself to the problem of compensation on several occasions. The judiciary was unable to formulate a single standard of just compensation; at best it could only devise particular solutions of limited application.

Indicative of the complexities involved in judging what constitutes just compensation was the problem of the Court in disposing of cases of government leasing of private property. An examination of

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[71] Ibid., p. 765.

[72] United States ex rel T.V.A. v. Welch, 327 U.S. 546 (1946).

[73] Monongahela Navigation Company v. United States, 148 U.S. 312 (1892).

three condemnation cases affords some insight into the problem. These cases were United States v. General Motors Corporation,[74] United States v. Petty Motor Company,[75] and United States v. Westinghouse.[76] All three companies had been forced to vacate premises acquired by the government. All had incurred certain expenses in dismantling, removing and relocating their business enterprises. The question facing the Court was whether these expenses should be considered in determining fair compensation. In reaching a decision the length of each lease was examined. Concerning the General Motors case, the Court maintained that, since government occupancy was for a period shorter than the company's lease specified, removal expenses should be considered:

> Not as independent items of damage but to aid in determination of what would be the usual -- the market price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease.[77]

In the Petty case the Court ruled that removal costs could not be considered where the government took the whole lease, and where a contingent reservation for government vacation of the building prior

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[74] 323 U.S. 373 (1944).

[75] 327 U.S. 372 (1946).

[76] 339 U.S. 261 (1949).

[77] United States v. General Motors Corporation, 323 U.S. 373, 383 (1944).

to the termination of its lease existed. Conversely, in the Westinghouse litigation, the government lease ran for a shorter period than the Westinghouse lease but had the right of extensions, resulting in the abrogation of the latter's agreement. Under such circumstances, expenses involved in moving could not be considered in determining just compensation.

Government requisitions of materials owned by private companies evoked similar questions of just compensation. When the United States requisitioned 225,000 pounds of lard and pork products, the affected company rejected the contention that ceiling prices rather than the replacement value of the requisitioned products be used as a standard for just compensation. The Court rejected replacement value and accepted ceiling prices.[78] The judiciary similarly dismissed a court of claims holding that retention value must be taken into account as a measure of fair compensation for the requisition of whole pepper.[79] However, when the government condemned a private laundry for military use, the Court, over the strenuous objections of four justices,[80] stated that "diminution in the value of its business due to the destruction of its trade routes" was a compensative factor.[81] In ascertaining fair compensation, neither the enhancement

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[78] United States v. Felin and Company, Inc., 334 U.S. 624 (1947).

[79] United States v. Commodities Corporation, 339 U.S. 121 (1949).

[80] Justice Douglas, Chief Justice Vinson, Justices Black and Reed.

[81] Kimball Laundry Company v. United States, 338 U.S. 1 (1948).

value created by virtue of the government's requisitioning of a merchant vessel,[82] nor net earnings over a period of years[83] is a valid gauge.

Compensation is usually required and the Court will not accept the government's refusal to offer payment when it can be proved that there has been a taking of property within the meaning of the Fifth Amendment. In United States v. Causby[84] the respondents were owners of a small chicken farm adjacent to an air field. Military planes made frequent use of the air strip, and, in coming in for landings, the noise was so great that it resulted in the death of several chickens. The Court concluded that "flights over private land are not a taking unless they are so frequent as to be a direct and immediate interference with the enjoyment of the land."[85] In unusual cases private property may be destroyed to prevent it from falling into enemy hands without the corresponding requirement that compensation be tendered. "The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war."[86]

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[82] United States v. Cors, 327 U.S. 325 (1948).

[83] United States v. Toronto, Hamilton and Buffalo Navigation Company, 338 U.S. 396 (1947).

[84] 328 U.S. 256 (1945).

[85] Ibid., p. 266.

[86] United States v. Caltex, Inc., 344 U.S. 149 (1952).

Labor. Nothing is more vital to the program of wartime mobilization than the uninterrupted production of the essential materials for victory in war. Whenever labor and management cannot settle their differences, some governmental intervention is imperative. During World War II an extensive program of controls was enacted.[87] Disputes did arise, but most were settled by administrative agencies. When ordinary procedures of mediation failed to restore industrial peace, the more efficacious device of governmental seizure may be resorted to. This practice is sometimes called executive commandeering, and more often than not the President's authority is based on explicit congressional authorization.[88] No cases reached the Supreme Court during World War II that dealt directly with the constitutional aspects of executive seizure. In 1947 the Supreme Court reviewed the contempt convictions of John L. Lewis and the United Mine Workers.[89] The case did not directly concern the President's power to seize the coal mines pursuant to congressional authorization. Only inferentially did the majority touch on this issue. One passage in Chief Justice Fred Vinson's opinion is nonetheless revealing. The jurist remarked:

> Under the conditions found by the President to exist, it would be difficult to conceive of a more vital and urgent function of the Government than the seizure and

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[87] "A Symposium on Labor Law in Wartime," Iowa Law Review, 29(1944).

[88] "Executive Commandeering of Strike-Bound Plants," Yale Law Journal, 51 (1941-42), 284.

[89] United States v. United Mine Workers, 330 U.S. 258 (1946).

operation of the coal mines.[90]

It would seem that joint executive-congressional action in the seizure of strike-bound plants meets the test of constitutionality. But left in abeyance is the issue of independent executive seizure. Precisely this question confronted the Court in 1952 in Youngstown Sheet and Tube Co. v. Sawyer.[91] Late in 1951 an impending steel strike threatened to curtail seriously the production of that metal so vitally needed in the Korean War. Efforts at mediation failed and, on April 4, 1952, the union gave notice of a strike to begin on April 9. Thereupon, President Truman temporarily seized the steel mills and notified Congress of his action. The latter did not act. The companies immediately sought and obtained a restraining order in district court. The Supreme Court granted certiorari.

Justice Hugo Black delivered the opinion of the Court and declared the President's action without statutory basis and unconstitutional. He noted that Congress, when considering the Taft-Hartley Act in 1947, had expressly vetoed executive seizure. Neither was Black persuaded that an aggregate of constitutional powers, including the executive power, the power to see that the laws are faithfully executed, and the power of the President as Commander-in-Chief could validate the steel seizure. Of the six justices concurring, each

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[90] Ibid., p. 289.

[91] 343 U.S. 579 (1951).

wrote an opinion; these ranged from Justice Felix Frankfurter's lengthy exposition on separation of powers, to Justice Tom Clark's terse assertions that the President had failed to rely on acts of Congress that would permit seizure in certain instances. Chief Justice Vinson, joined by Justices Stanley Reed and Sherman Minton, dissented. They examined the past history of presidential seizures, which they contended provided precedent for Truman's action. Moreover, making allowances for the existing emergency, the President had acted in good faith and for good reason.

The many-sided views expressed in the Youngstown decision emphasized this fact -- the necessity for a common effort by the political branches of the government in taking temporary control of industrial plants. Whether the Court would validate independent executive seizure in an extreme emergency is problematic. One can only speculate on how this problem might have been handled during full-fledged hostilities. The Court exhibits a distinct discomfort with anything approaching executive prerogative, even though they are usually willing to accede to plenary discretion. The issue may be moot since it is unlikely that Congress in future emergencies would deny such powers to the executive.

Alien Property. Property rights are not sacrosanct. This fact is manifestly evident from the Court's disposition of attacks on the constitutional validity of governmental restrictions imposed to foster national security. Ordinarily American-owned property enjoys some safeguards from unreasonable and arbitrary governmental action.

However, alien property occupies a far more precarious position and may be subjected to rigid controls. The practice often resorted to is confiscation. Such procedures are not novel. As early as 1814 the Court recognized the right of Congress to seize enemy property,[92] and after the Civil War the Court validated seizures made during the recent conflict.[93] In three wars, the War of 1812, the Mexican War, and the Spanish-American War, no action was taken against alien property.[94] Authority for confiscation of alien property during World War I was granted by the Trading-with-the-Enemy Act. This Act empowered the alien property custodian to seize and retain possession of property pending its final liquidation. He could not, under the terms of the Act, sell any vested property except in cases of non-durable goods, or when such sale was for the purpose of protecting the property. The property could be disposed of when it was in the best interests of the United States to do so.

As in World War I, the Trading-with-the-Enemy Act served as the basis of federal action for handling enemy property after 1941. Some modifications were incorporated in the First War Powers Act of December 1941. Whereas the earlier law had restricted the term "enemy" to residence, the amended version comprehended persons acting in

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[92] Brown v. United States, 12 Cranch 110 (1814).

[93] Miller v. United States, 11 Wall. 268 (1870).

[94] Rudolph M. Littauer, "Confiscation of the Property of Technical Enemies," Yale Law Journal, 52 (1942-43), 747.

behalf of the enemy. Judicial intervention was limited to the extent that a non-enemy might seek to establish interest, right or title in the property, but there was no requirement that the government surrender vested property. A subsequent amendment extended the seizure power to include property of all nationals, whether enemy or friendly. The program was supervised by the Office of Alien Property Custodian, and was later transferred to the Attorney-General.

There are many practical reasons for permitting the confiscation of enemy property. To allow enemies to benefit from the ownership of property in this country during war is obviously inconsistent with the best interests of the United States. As for the constitutional bases for confiscation, general sanction is found in the war powers, and, more specifically, in Article I, Section 8, Clause 11, which grants Congress the authority to "make rules concerning captures on land and water."

Numerous cases reached the Court after the cessation of hostilities growing out of governmental vesting orders. On no occasion did the Supreme Court contest the basic power of confiscation. In affirming the seizure of stock in a corporation chartered under the laws of a neutral country, the Court accepted the government's contention that the stock was held for the benefit of a German corporation as security for loans with Swiss banks.[95] Justice Reed, speaking for a unanimous Court, laid to rest any question concerning the

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[95] Silesian-American Corporation v. Clark, 332 U.S. 469 (1947).

constitutionality of government confiscation:

> There is no doubt but that under the war power, as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably, to wage war successfully, the United States may confiscate enemy property.[96]

It becomes apparent that enemy property or property in the possession of aliens and in some way, directly or indirectly, connected with the enemy may be seized. While the outer limits of congressional authority to vest alien property of whatever character are unspecified, the Court has maintained that congressional intent was not to prohibit recovery of property admittedly without enemy taint.[97]

Often the basic issues are clouded by the presence of American interest in confiscated property. The government's right to such property as a corollary to successful protection of national interests had to be compromised whenever possible with legitimate American claims. The Court has ruled affirmatively on the question of the jurisdiction of a federal district court "to determine the custodian's asserted right to share in decedent's estate which is in the course of probate administration in a state court." Later when confronted

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[96] Ibid., p. 475.

[97] Clark v. Uebersee Finanz Korporation, 332 U.S. 480 (1947). Uebersee Finanz Korporation v. McGrath, 343 U.S. 205 (1951). In the latter case the government proved the presence of "enemy taint," and the Court ruled that the corporation was precluded from recovery.

[98] Markham v. Allen, 326 U.S. 490, 492 (1945).

with the issue of whether or not the alien property custodian was entitled to the property, the Court concluded that the disposition rested on the determination of the nationality of the deceased. A treaty with Germany in 1923 permitting German aliens to inherit property had not been necessarily abrogated by the Trading-with-the-Enemy Act.[99]

Complementary with the power to seize property is the authorization for the freezing of foreign funds and assets. Transfer of funds that had been frozen by executive order was barred by the government unless a federal license was first obtained. In 1941 a New York law made provision for one Propper to become temporary receiver for an Austrian association which had gone out of business.[100] Two days later a government freezing order was issued, which prohibited certain transactions involving Austrian property unless in pursuance of a federal license. The New York receiver undertook to recover money owed to A. K. M. by the American Society of Composers, Authors, and Publishers (A.S.C.A.P.). Following the default of A.K.M., Propper was appointed the permanent receiver. Two years later the Alien Property Custodian vested the debts owed by A.S.C.A.P. to A.K.M. Litigation followed, with the custodian seeking a Court decree that the funds be turned over to him. The judgment in the lower court

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[99]Clark v. Allen, 331 U.S. 503 (1946).

[100]Staatlich Gesellschaft der Autoren, Komponesten und Muschuerleges. Hereafter referred to as A.K.M.

favored the custodian, and the Supreme Court granted certiorari in Propper v. Clark.[101] Short shrift was made of the petitioner's claim. Since the receiver's action clearly constituted a transfer of funds without prior government approval, it was forbidden by law. No constitutional question about the validity of freezing orders was raised. At best this case, as did subsequent ones, involved the scope of state authority within the framework of federal control.[102]

Judicial protection has been extended to the rights of innocent stockholders in a corporation organized under the laws of a neutral country, yet controlled and dominated by enemy nationals. In such cases innocent stockholders are entitled "to an interest in the assets proportionate to their stock holdings."[103] However, the Court has refused to endorse the right of collection of interest on money owed to vested enemy corporations.[104] The judiciary has displayed an

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[101] 337 U.S. 472 (1948).

[102] Zittman v. McGrath, 341 U.S. 446 (1950). Federal freezing orders do not preclude writs of attachment in state courts, provided such attachments do not prejudice the government's right to keep the funds frozen. Zittman v. McGrath, 341 U.S. 471 (1950). The Custodian may require that accounts be turned over to him, however this action does effect state court attachments. Lyon v. Singer, 339 U.S. 841 (1949); Brownell v. Singer, 347 U.S. 403 (1953). The establishment of preferences in blocked assets is not inconsistent with federal control. Orvis v. Brownell, 347 U.S. 183 (1952). A freezing order precludes creditors from subsequently acquiring an interest, right, or title in property which has the effect of validating a claim against the Custodian under Sec. 9(a) of the Act.

[103] Kaufman v. Societe Internationale, 343 U.S. 156, 160 (1951).

[104] McGrath v. Manufacturers Trust Company, 338 U.S. 241 (1949).

unwillingness to construe congressional legislation in a manner creating undue hardship. A German citizen, Guessefeldt, resided in Hawaii from 1896 to 1938, and subsequently took a vacation to Germany, where he was detained after the outbreak of war. During his forced detention in Germany, his property was vested in the Alien Property Custodian. Following his release, Guessefeldt sought recovery on the grounds that he had not been a resident of enemy territory in the sense contemplated by Section 2 and Section 9(a). This interpretation was accepted by the Court, but the government also argued that a congressional enactment in 1948 prohibited the return of property formerly belonging to German nationals. The Court did not believe that this legislation was intended to prevent the return of property otherwise subject to return under Section 9(a).[105]

The Court's treatment of cases involving alien property imposed few problems for the government. The existence of enemy taint, direct or indirect, was sufficient ground for exercising the power of confiscation. While the judiciary was less desirous of interpreting congressional legislation to cover the seizure of neutral and friendly alien property, it did not dispute the existence of such power. The technical questions growing out of American interests in alien property were resolved without real hardship for the government.

Summary. In the years since 1941 the vast program of economic mobilization undertaken in the name of national security has greatly

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[105] Guessefeldt v. McGrath, 342 U.S. 308 (1951).

enhanced the powers of the federal government. Simultaneously, property rights have borne the brunt of this unparalleled expansion of authority. The inevitable consequence has been to focus attention on judicial pronouncements that gave confirmation to the ever-broadening scope of federal economic power.

It is obvious that the phenomenon of total war demands sacrifices of private vested interests which, under ordinary circumstances, might expect constitutional and statutory protection. Since war might require the sacrifice of life as well as personal liberty, it was inconceivable to the Court that the government should be denied appropriate power to employ fully our material resources. Compelling national needs far outweighed personal inconveniences whenever the Supreme Court could be convinced that various programs were designed to achieve the desired end.

It may be erroneous to suggest that the justices adhered to the maxim that the end justified the means, but their language and decisions afford ample evidence of a most flexible and pragmatic approach. On not a single occasion, when confronted with basic governmental policy, did the judiciary contest their constitutional validity. Price control, rent control, rationing, renegotiation, as well as confiscation of property, citizen and alien, passed without so much as a hint of judicial obstruction. The Court expressly reserved opinion on the dimensions of governmental authority, confining itself to decisions based on narrow issues. Congressional and executive discretion, especially when exercised jointly, also went

unchallenged. What particular means were appropriate was a decision left to the policy makers.

Having removed itself from active interference with substantive issues vis-à-vis property rights, the Court, nevertheless, could and did insist that due process not be abandoned. In essence the judiciary seemed to say to Congress and the President: "you are chiefly responsible for national security." But we do expect, even require, that it be done in accordance with procedures explicitly detailed and conscientiously and faithfully applied. One can conjecture, and only conjecture can be offered here, that, insofar as personal and property rights are at issue, the Court construes its role in the area of national security to be far more limited when dealing with economic rights.

CHAPTER III

ALIENS

Inevitably, the controls that are exercised over aliens residing in the United States are more stringent in wartime than in peacetime. But the termination of hostilities does not necessarily insure a more beneficient attitude on the part of the government. In the past twenty years the political branches of government have revealed a growing awareness of the close relationship between alien regulation and national security. The Supreme Court's involvement has served to strengthen this aspect of the government's program of internal security.

Governmental Power Over Aliens. As a preliminary consideration to the Court's attitude, some examination of governmental authority is advisable. It is a well-established principle of international law that no nation is required to admit aliens to its shores.[1] Permission is an act of legislative grace that may be extended or denied as determined by the circumstances. The plenary power of exclusion is without limit, either in international or domestic law. The Constitution vests in Congress the authority "to establish a uniform Rule of Naturalization"[2] and "to regulate commerce with foreign

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[1] J. L. Brierly, The Law of Nations (Oxford, 1936), p. 172.

[2] Article I, Section 8, Clause 4.

nations."[3] Both imply control over the admission of aliens, and continued supervision of the non-citizen residing either temporarily or permanently in the United States. Repeatedly the Supreme Court has stressed in emphatic terms the settled nature of this power.

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.[4]

The complementary authority for the deportation of aliens has been described "as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[5] Moreover, the power to expel aliens is "an inherent and inalienable right of every sovereign and independent nation."[6] It would seem that such virtually unlimited power, springing from the nature of sovereignty and articulated by explicit constitutional and statutory authority, leaves little for judicial determination. Had not Congress circumscribed its own vast power by clearly defined statutory limits, the role of the Court would be insignificant.

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[3]Article I, Section 8, Clause 3.

[4]Chae Chan Ping v. United States, 130 U.S. 581, 603 (1888). Also, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1891); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1949). 'Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.'

[5]Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

[6]Ibid., p. 711.

Historically, Congress has accorded generous treatment to the alien. Not until the 1880's did restrictive immigration legislation begin to curtail the formerly uninterrupted stream of aliens seeking admittance to these shores.[7] Subsequent congressional enactments defined excludable classes and afforded grounds for controlling the activities of the resident alien. Judging from the aforementioned cases, legislative discretion is apparently conclusive insofar as standards for admission are concerned. But the executive branch, in implementing congressional commands, may not exceed statutory authority or violate the canons of due process of law. At least within these areas judicial restraints may be imposed. Therefore, as the Supreme Court confronted litigation arising out of the government's programs, it did so against the background of rather clearly defined substantive power to govern the entrance and expulsion of aliens. It may be tentatively hypothesized that Court pronouncements came largely in matters of procedure and statutory interpretation rather than constitutional questions. However, an analysis of various cases will illuminate the judiciary's role and simultaneously will clarify the predilections of individual justices.

In large measure the treatment afforded aliens since 1940 indicates an extension of the government's dominant concern for internal security. The presence of persons in a society whose philosophy and conception of government is distinctly incompatible with democracy

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[7]Chinese Exclusion Act, 22 Stat. 58 (1882).

may, even under normal conditions, suffer hostile public reception. Yet when the times are not normal, and the alien's status is clouded by failure or inability to acquire the protection of American citizenship, this hostility frequently culminates in more concrete restrictions.

Exclusion. A vital facet of legislatively imposed requirements is the exclusion of undesirable foreign elements. As one commentator has observed, "Vigilance at the gates of entry manifestly is a prime requisite to the maintenance of security."[8] No alien can assert as a matter of law the right to enter the United States. The first congressional expression on exclusion relating specifically to internal security came in 1917. The Immigration Act denied admission to anarchists and other persons who advocated violent overthrow of the government.[9] The Passport Act of 1918, as later amended in 1941, established various other regulations concerning the entry and exit of foreign subjects.[10] The most recent legislation is the Internal Security Act of 1950.[11] This comprehensive enactment deals with a multitude of points, one of which is to prevent the entry of members of the Communist Party.

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[8] Charles Gordon, "The Immigration Process and National Security," Temple Law Quarterly, 24 (1951), 303.

[9] 39 Stat. 875 (1917).

[10] 40 Stat. 559 (1918); 55 Stat. 252 (1941).

[11] 64 Stat. 1006 (1950).

Immigration regulations regarding exclusion as they relate to national security have engendered relatively few judicial controversies. They have primarily concerned the discretionary powers of the executive branch in conforming with existing statutes. Whatever may be the extent of the power to exclude, at the least the alien is usually extended a hearing at which time the reasons for his exclusion are given. There may be occasions, however, when even the minimum guarantee of a hearing is dispensed with. Summary dismissal of any right to hearings was sustained by the Supreme Court in Knauff v. Shaughnessy.[12] Mrs. Ellen Knauff had married an American serviceman in Germany. In 1948 she sought admission to the United States. While detained on Ellis Island, the Assistant Commissioner of Immigration recommended to the Attorney General that she be permanently excluded because her admission would be prejudicial to the interests of the United States. No hearing was conducted, and the reasons for her exclusion were not disclosed. In affirming the discretion exercised by the Attorney General, Justice Minton remarked:

> At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right.[13]

Actually the issue was not so simple. Congress had made it possible for aliens who married American servicemen to obtain entry to the

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[12] 338 U.S. 538 (1949).

[13] Ibid., p. 542.

United States through a simplified procedure.[14] Nonetheless, earlier legislation gave the Attorney General the power, during war, to deny admission without hearing.[15] The Court saw no necessary conflict, believing that the latter law had not been altered by subsequent legislation. There was no denial of due process, and the Court observed candidly: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[16] Justices Black, Frankfurter, and Jackson dissented.

The distinction between persons seeking admission to the United States for the first time and resident aliens is significant. The demands of due process are more stringent for the latter. An individual within the United States, whether citizen or alien, must be accorded due process of law. And due process may be most important, as, for example, in the case of a Chinese seaman admitted to the United States in 1945, and to permanent residence in 1949.[17] While serving as Chief Steward on an American ship, he left the country and upon his return was ordered excluded. A hearing was denied and, as in the Kanuff case, the information on the basis of which he was denied admission was not made public. The Supreme Court concluded that he was a resident alien despite his short sojourn outside the country,

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[14] 59 Stat. 659 (1945).

[15] Act of June 21, 1941, 55 Stat. 252 (1941).

[16] Knauff v. Shaughnessy, 338 U.S. 538, 544 (1949).

[17] Kwong Hai Chew v. Colding, 344 U.S. 590 (1952).

and that the regulation on which the Attorney General relied was not applicable in this situation. Justice Burton hastened to add:

> Section 175.57(b)'s authorization of the denial of hearings raises no constitutional conflict if limited to "excludable aliens who are not within the protection of the Fifth Amendment.[18]

This statement was necessary to distinguish the Knauff case. Since Mrs. Knauff had never passed the gates of entry, she could not rely on constitutional protection. The Court recognized that it might later be established that the petitioner was subject to expulsion, but in the meantime, as a resident alien, he had the right to a hearing and to the disclosure of information against him. The detention of an excludable alien as distinguished from an alien who had gained entry into the United States, and the refusal to disclose the nature of the information on which exclusion was based encountered no judicial objections.[19] Because it was an exclusion case, the Attorney General, pursuant to appropriate regulations, could deny a hearing and also refuse to reveal information he possessed. The temporary parole of aliens pending a determination of admissibility does not constitute a status of being "within the United States" and, therefore, subject to the Attorney General's discretion in withholding deportation.[20]

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[18] Ibid., p. 600.

[19] Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1952).

[20] Leng May Ma v. Barber, 357 U.S. 185 (1957); Rogers v. Quan, 357 U.S. 193 (1957).

There was no intimation, even by the dissenting justices, in the aforementioned cases that Congress was lacking in authority to prescribe whatever regulations it wished concerning the admission of aliens. Furthermore, when the demands of security necessitated the withholding of information in exclusion cases, no appeals to due process could circumvent the Attorney General's rulings. Indeed, the Court, if it has a function to perform in exclusion cases, seemingly confines itself to a cursory examination of the facts. If these facts corroborate the contention that an alien falls within the excludable class, judicial intervention ends.

Enemy Aliens. The summary procedures applicable to aliens at the gates of entry are ameliorated when directed towards those individuals who have been accorded the status of resident aliens. In peacetime few tangible restrictions are imposed. Aliens enjoy the privilege of protection of law, the right to pursue an occupation,[21] and access to the courts,[22] except that alien enemies may find the latter proscribed during the exigencies of war.[23] The commencement of hostilities necessitates the distinction between alien enemies and friendly or neutral aliens. The former is a citizen or subject of an enemy nation who resides in this country and is over the age of fourteen.[24] As early as 1938, Congress took steps to restrict the

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[21] Takahashi v. Fish and Game Commission, 334 U.S. 410 (1947).

[22] Ex parte Kawato, 317 U.S. 69 (1942).

[23] Ex parte Colonna, 314 U.S. 510 (1941).

[24] Alien Enemy Act of 1798, 1 Stat. 577 (1798).

activities of persons acting in behalf of foreign governments by requiring that they register with the Secretary of State.[25] A subsequent effort on the part of the government to require disclosure of all activities, whether or not related to the agent's services, was invalidated by the Supreme Court.[26]

After the United States entered the war in December 1941, enemy aliens were subjected to careful supervision. Naturalization of enemy nationals was terminated for the duration of the war, even in cases where such proceedings had begun before the outbreak of hostilities.[27] Contemporaneously, numerous enemy aliens were taken into custody and incarcerated. The implementation of programs of alien control was vested in the executive branch of government in accordance with congressional authorization.[28] The Alien Enemy Act of 1798 empowers the President, during war, to apprehend, detain, and remove enemy aliens at his discretion.[29] The general procedure followed in such cases during World War II was fairly consistent. Arrest of enemy aliens was undertaken by the Federal Bureau of Investigation.

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[25] Act of June 8, 1938, 52 Stat. 631 (1938), as amended by the Act of August 7, 1939, 53 Stat. 1244 (1939).

[26] Viereck v. United States, 318 U.S. 237 (1942).

[27] "Civil Rights of Enemy Aliens During World War II," Temple Law Quarterly, 17 (1942-43), 88.

[28] S. Billingsley Hill, "The Mechanics of Alien Enemy Control," George Washington Law Review, 10 (1941-42).

[29] 1 Stat. 377 (1798).

No warrant was necessary. Temporary detention was followed by a hearing before a Civilian Hearing Board composed of an attorney and two laymen. On the basis of information derived from such hearings, the Board made recommendations to the Attorney General concerning the ultimate disposition of the case. These recommendations included parole, in which event the internee would be released under the charge of an American citizen with the right to revoke paroles if future conditions warranted. Secondly, the Board might advise the Attorney General to grant unconditional release, or, lastly, continued detention. In any event, the final decision was the Attorney General's. With one exception this entire process was consummated without benefit of judicial review. Internees were permitted to seek a writ of habeas corpus, but this relief was comparatively ineffectual, since the courts confined themselves to determining whether the persons held were enemy aliens.[30] The Supreme Court was never afforded the opportunity to review these regulations. There is no evidence, however, to suggest that these practices would have encountered hostile reception at the hands of the justices. There are ample reasons to aver that alien enemies may claim approximately the same judicial protection as that provided non-citizens seeking entry into the United States, when the chief executive acts in accordance with Congressional authorization. This thesis is fully substantiated by an examination of the latitude of discretion that the Court permits

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[30]Hill, p. 857.

in the deportation of alien enemies.

The Alien Enemy Act was utilized by the President to deport alien enemies after the cessation of hostilities, though before a peace treaty was concluded. One German alien was taken into custody and ordered deported in 1946. He challenged the deportation order as being unauthorized in the absence of armed conflict; the Act of 1798 was, in any event, unconstitutional. Both contentions were rejected by the Supreme Court.[31] The constitutional issue was disposed of without dissent; four justices, however, were reluctant to construe the statute in such a way as to permit deportations after actual fighting had ended (even though technically the United States was still at war). The majority was undisturbed by the de facto state of peace in the absence of a de jure determination by the political branches in whom this responsibility was vested. Justice Frankfurter spoke for his concurring colleagues in stating:

> We hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it -- on the President of the United States.[32]

Frankfurter's deference to the President's sense of justice seemed

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[31] Ludecke v. Watkins, 335 U.S. 160 (1947); Ahrens v. Clark, 335 U.S. 188 (1947). German aliens detained on Ellis Island were not within the territorial jurisdiction of the district court of the District of Columbia, therefore, that court could not entertain a petition for a writ of habeas corpus.

[32] Ludecke v. Watkins, 335 U.S. 160, 173 (1947).

insufficient to the minority, and the artificial distinctions between war and peace obviously rankled their own sense of fair play. Justice Black was frankly sceptical of the advisability of extending this tremendous power beyond the termination of hostilities: "I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is pure fiction."[33] Furthermore, he noted: "The 1798 Act did not grant its extraordinary and dangerous powers to be used during the period of fictional wars."[34] The apprehensions of Black and the other dissenters were apparently based on their fears of what might be the ultimate consequences of the doctrine expounded by the majority. Yet the contention that the Act did not cover circumstances such as these is founded on evidence of congressional intent that at best is inconclusive. A different result follows when the state of war has been ended by political action. A German citizen was taken into custody and ordered deported in 1946. A district court's rejection of a writ of habeas corpus was affirmed by the Court of Appeals. Immediately before the Supreme Court took action, a joint resolution of Congress officially announced the termination of the war, and the judiciary in a per curiam opinion held that this action left the Attorney General without authority to expel enemy aliens.[35] Enemy aliens who might be outside the

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[33] Ibid., p. 175.

[34] Ibid., p. 178.

[35] United States ex rel Jaegler v. Carusi, 342 U.S. 347 (1951).

territorial limits of the United States may discover that even elementary judicial safeguards are denied. Several German nationals were tried and convicted before a military commission in China. Appeal to the district court for habeas corpus relief was denied, but the Court of Appeals felt the writ should be issued. The Supreme Court on review, could find no historical precedent sustaining the issuance of the writ to an enemy alien who at no time came within the territorial jurisdiction of the Court.[36] Justice Jackson asserted:

> Executive power over many enemy aliens, undelayed and unhampered by litigation, has been deemed throughout our history essential to our wartime security.[37]

Concerning the general scope of alien rights, the jurist noted:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.[38]

The status of the enemy alien is indeed precarious. He may in time of war be subjected to unprecedented restraints and summary deportation. His very presence may be inimical to the interests of national security, and, until such time as the political branches of government have signified the end of war, his chief reliance must of

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[36] Johnson v. Eisentrager, 339 U.S. 763 (1949).

[37] Ibid., p. 774.

[38] Ibid., p. 778.

necessity be on the rudimentary standards of justice that Congress believes proper to prescribe. Even though his anomalous position may be no fault of his own, the cold realities of war sometimes provide no relief for injustices.

Deportation of Resident Aliens. The deportation of undesirable aliens for security reasons has become more widespread in the period since 1941 and especially in the post-war period. Actual hostilities made imperative, under certain conditions, the removal of alien enemies. But the conclusion of World War II signalled the beginning of a new era characterized by growing antagonism between basically divergent philosophies of government, Communism and Democracy. As the threat of world Communism increased in international affairs, concern over the internal threat posed by forces dedicated to violent changes in the American form of government was spearheaded by demands for governmental action. Programs designed to insure internal security were put into effect. A natural concomitant of this increased vigilance was reflected in the expulsion of alien Communists whose presence did not harmonize with widely held democratic values. Judicial involvement in deportation cases was unavoidable in view of the Court's repeated assurances that constitutional protection extended to the resident alien.

As noted earlier, the power of Congress to authorize deportation is plenary. There is no judicial precedent that casts serious doubt on the substantive power of Congress to expel. But the alien who is the victim of such drastic action is not without recourse to law.

The Fifth Amendment provides, among other things, that "no person may be deprived of life, liberty, or property without due process of law." Clearly an alien is a "person" within the meaning of this amendment and may therefore avail himself of whatever protection flows from due process. There is some question concerning the scope of the power to deport resident aliens. Is the authority of Congress limited to the deportation of aliens whose pre-entry activities furnish reasonable evidence that they were illegally admitted in the first place? Or do subsequent activities, unrelated as they may be to actions prior to entry, afford ample basis for deportation?[39] The latter view, enhancing congressional authority, would seem to admit of no substantial judicial curtailment, while the former position imposes a check on legislative expulsion policies.[40] The Supreme Court has not yet embraced pre-entry activities as the sole foundation for deportation. One commentator has described the nature of the power of deportation and the constitutional rights of the alien as follows:

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[39]Siegfried Hesse, "The Constitutional Status of The Lawfully Admitted Resident Alien: The Inherent Limits of The Power to Expel," Yale Law Journal, 69 (1960). The author states his view at p. 275, "Absent conditions which justify invoking the war powers, or clear reliance by the alien on his foreign nationality, the power of Congress to expel lawfully admitted, long-term resident aliens can be exercised only against those who were or can reasonably be presumed to have been excludable on the basis of pre-entry characteristics."

[40]Ibid., p. 295.

> Congress could, of course, abolish all immigration, whatsoever, or exclude any classes of immigrants. And probably no one would contend that it would raise a substantial constitutional question if Congress ordered deportation of anyone in violation of its restrictions. But if resident aliens are constitutional "persons" with respect to their life, liberty and property, there is no reason why they should not continue to be "persons" with respect to the most important of all rights -- the right to remain in the country.[41]

Legislation existing as early as 1918 permitted the expulsion of aliens who advocated the violent overthrow of the United States government, or who belonged to organizations that advocated the same.[42] The government's removal of aliens from this country suffered a serious setback in 1938 when the Supreme Court interpreted the 1918 Act to authorize deportation of persons presently members of the Communist Party. Past membership that was no longer held was insufficient.[43] Congressional reaction was evident as that body passed the Alien Registration Act of 1940, stipulating that past affiliation, either at time of entry or subsequently, with any organization advocating violent overthrow of the United States would justify deportation.[44]

Since expulsion results in drastic action and in the loss of

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[41] "Constitutional Restraints on The Expulsion And Exclusion of Aliens," Minnesota Law Review, 37 (1952-53), 458.

[42] The Anarchist Act of 1918, 40 Stat. 1012 (1918).

[43] Kessler v. Strecker, 307 U.S. 22 (1939).

[44] 54 Stat. 670 (1940).

advantages previously enjoyed, the Court has shown a disinclination to accept less than substantial proof of disloyalty or membership in suspect organizations. Deportation may result, to use the trenchant phrase of Justice Brandeis, in the loss "of all that makes life worth living."[45] If that burden of proof cannot be sustained, the Court will not sanction expulsion. The government's effort to deport Harry Bridges is a case in point. The judiciary refused to affirm a deportation order on the grounds that Bridges' connection with the Communist Party was too tenuous to justify expulsion.[46] As the Court viewed Bridges' action, it remarked:

> When we turn to the facts of this case we have little more than a course of conduct which reveals cooperation with Communist groups for the attainment of wholly lawful objectives.[47]

Analyzed in this perspective, Justice Douglas, for the majority, asserted:

> We cannot assume that Congress meant to employ the term "affiliation" in a broad fluid sense which would visit such hardship on an alien for slight or insubstantial reasons.[48]

Chief Justice Stone, who was joined by Justices Roberts and

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[45] Ng Fung Ho v. White, 259 U.S. 276 (1922).

[46] Bridges v. Wixon, 326 U.S. 135 (1944).

[47] Ibid., p. 145.

[48] Ibid., p. 147.

Frankfurter, dissented. It was their belief that the evidence was sufficient to justify Bridges' deportation.

In 1950 Congress passed the Internal Security Act.[49] The law made deportation of aliens permissible upon the establishment of proof that an alien held membership in the Communist Party. The legislature took notice of the world-wide aims of Communism and concluded that aliens affiliated with this organization might be deported. Among the discretionary powers vested in the Attorney General under the law was the right to deny bail to alien Communists detained pending deportation. Acting in compliance with this section of the law, the Attorney General refused to grant bail to several Communist leaders, and his discretion was sustained by the Supreme Court.[50] In a 5-4 opinion Justice Reed could cite no abuse of the discretion:

> The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of due process under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this government.[51]

The majority did not interpret the Eighth Amendment as a bar to the action contemplated by the statute. This amendment, though prohibiting excessive bail, does not require that bail be granted in all cases. Justice Black was offended by the scope of power to which the Court

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[49] 64 Stat. 1006 (1950).

[50] Carlson v. Landon, 342 U.S. 524 (1951).

[51] Ibid., p. 542.

gave approval, and with characteristic vigor denounced such practices:

> My own judgment is that Congress has not authorized the Bureau of Immigration to hold people in jail without bond solely because it believes them "dangerous." Nor do I think that Congress has power to grant any such authority even if it had attempted to do so.[52]

Justice Douglas was similarly inclined vis-à-vis the constitutional issue, but Justices Frankfurter and Burton, while feeling that the Attorney General had exceeded his discretion, were careful to express no disagreement on the constitutional power of Congress. Undeniably, dangerous Communist aliens left free to engage in pursuits harmful to internal security are a legitimate concern of the federal government. Significantly, the Court chose to defer to Congress when confronted with explicit statutory language. Due process and the Eighth Amendment could be reasonably accommodated to the demands of security, however inconvenient the outcome may have been in terms of elementary procedural rights.

While the Court had examined the evidence available to support deportation orders in the Bridges case, it had not, before 1951, focused attention on those provisions of the Alien Registration Act making past membership in the Communist Party grounds for expulsion of resident aliens. This issue reached the Court in Harisiades v. Shaughnessy.[53] The petitioners had severed their affiliation with

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[52] Ibid., p. 553.

[53] 342 U.S. 580 (1951).

the Party prior to the passage of the 1940 Act, but they were nevertheless ordered expelled from the United States. In affirming the constitutionality of the legislation, the Court also rejected the contention that these orders were illegal because they constituted ex post facto legislation. The majority merely referred to the established precedent that ex post facto prohibitions applied only to penal legislation, and deportation orders were considered to be civil actions.[54] The Court's summary dismissal of this contention prompted one critic of the decision to remark tersely: "Stare decisis is an irrelevant answer to constitutional questions of major import."[55] It seems quite likely that, in this particular instance, stare decisis was a convenient cloak for judicial reticence. Deportation policy had in large part been fashioned on this judicial rule. The majority probably felt the wisest course, given the momentous issues involved, was to refrain from open harassment of governmental policy. In defining the breadth of power possessed by the Congress, Justice Jackson virtually removed all judicial impediments:

> It does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance, his domicile here is held by a precarious tenure.

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[54] Bugajewitz v. Adams, 228 U.S. 585 (1912); Mahler v. Eby, 264 U.S. 32 (1924).

[55] Hesse, p. 286.

> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the nation over the alien, and we leave the law on the subject as we find it.[56]

The implications of these pronouncements are manifold. The language employed suggests a sweeping power of expulsion that belies the contention that long-term resident aliens do not come within the province of congressional authority. It is noteworthy that Jackson ignores the argument that pre-entry activities alone govern future deportability. All of the petitioners in the instant case had joined the Communist Party after admittance to the United States. Clearly they were expelled for post-entry conduct. Finally, the Court has admitted that deportation is a "weapon of defense" and an inherent power of sovereignty. Simultaneously, Jackson has invoked the "war power" (which he states is not restricted to wartime), the inherent powers of sovereignty and judicial precedents to establish congressional primacy. That justice then referred to practical considerations for justifying refusal to abridge judicial self-restraint:

> We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny the government's power of deportation.[57]

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[56] Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1951).

[57] Ibid., p. 591.

The meaning of this statement is obvious. Given the temper of the times, it is not for the courts to tamper with policies concerning expulsion clearly related to national security. Such an admission may be commendable for its candor, but it is also indicative of judicial expediency. It implies that the Court may also take cognizance of current Communist aims, and, applying the test of reasonableness, accept steps taken by Congress to meet internal dangers.

With the enactment of the Internal Security Act of 1950, membership in the Communist Party was made prima facie evidence of the necessity of deportability. Whereas previously the government was forced to establish in each case that the Communist Party advocated violent overthrow of the government, all that was now necessary was for the government to establish affiliation with the party. In affirming the constitutionality of these provisions of the Act, the Court proclaimed:

> The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.[58]

It made no difference that the alien joined the party without full knowledge of the true purposes of Communism.

> It is enough that the alien joined the Party, aware

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[58] Galvan v. Press, 347 U.S. 522, 530 (1953).

> that he was joining an organization known as the Communist Party, which operates as a distinct and active political organization, and that he did so of his own free will.[59]

Justice Black, in a bristling dissent, described the consequences of the Court's decision:

> For joining a lawful political group years ago -- an act which he had no reason to believe would subject him to the slightest penalty -- petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country.[60]

Whatever misgivings the majority may have had regarding the harshness of its decision, the majority felt constrained to follow precedent, precedent which the present Court had incidentally strengthened by Justice Jackson's opinion in the Harisiades case. More recently the Court ruled that an alien faced with deportation because of past Communist membership was saved because of the fact that his affiliation was wholly devoid of political implications.[61] Thus the Court was apparently willing to distinguish on the basis of the character of membership. The differences between political and non-political association with the party, and the majority is not precise in making the distinction, may require more explicit pronouncement in the future.

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[59] Ibid., p. 528.

[60] Ibid., p. 533.

[61] Rewoldt v. Perfetto, 355 U.S. 115 (1957).

The scope of judicial review of deportation orders has traditionally been restricted to habeas corpus proceedings.[62] The Supreme Court reaffirmed this position in denying a declaratory judgment and injunctive relief in a deportation case,[63] but subsequently maintained that the Immigration and Nationality Act of 1952 did not expressly override the liberal judicial review granted under the Administrative Procedure Act of 1946.[64] Therefore, the equitable powers of the judiciary could be relied on. Nonetheless, the expanded scope of judicial review hardly portends any basic modification in the power to expel.

When called upon to square the actions of the Attorney General with existing legislation, the Court has reached different conclusions. In Jay v. Boyd[65] the use of confidential information outside the record of the hearing was sustained as consistent with the Immigration and Nationality Act.[66] Still, an alien against whom a deportation order had been outstanding for six months could not be required to offer information unrelated to his availability for expulsion.[67] The Court construed the appropriate statutory provisions

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[62] Tisi v. Tod, 264 U.S. 131 (1923); Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1926); Costanzo v. Tillinghast, 287 U.S. 341 (1932).

[63] Heikkila v. Barber, 345 U.S. 229 (1952).

[64] Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

[65] 351 U.S. 345 (1955).

[66] 66 Stat. 215 (1950).

[67] United States v. Witkovich, 353 U.S. 194 (1956).

as follows:

> It is permissible and an appropriate construction to limit the statute to authorizing all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue.[68]

The Acquisition of Citizenship. In the normal course of events, the transition from alienage to citizenship liquidates in the final stage the plenary control exercised by Congress. Other than the bar against becoming President, the naturalized citizen assumes the same privileges and immunities as the native-born citizen.[69] If he can successfully surmount the obstacles in the naturalization process, the new citizen can reasonably feel secure.

A foreign national may not assert a constitutional claim to citizenship. It lies within the power of Congress to establish uniform rules of naturalization, and it would seem indisputable by this authorization that the legislative branch may dictate whatever standards it chooses as a condition for the acquisition of American nationality.[70] It is neither the judiciary's province nor its duty

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[68] Ibid., p. 202. Problems of entry have also confronted the Court. Bonetti v. Rogers, 356 U.S. 691 (1957). Ascertaining the correct entry among several for the purposes of determining expulsion. Tak Shan Fong v. United States, 359 U.S. 102 (1958). Judicial determination of the correct entry among several to be accepted as the commencement of legal residence requisite to acquiring citizenship.

[69] Article II, Section 1.

[70] "The Alien and The Constitution," University of Chicago Law Review, 20 (1952-53), 556.

to interpose its judgment except when it essays to ascertain congressional intent. The prospective citizen must satisfy his adopted homeland in renouncing all allegiance to his former country and in promising to defend the Constitution of the United States.[71] Such a requirement, on its face, is eminently reasonable. Difficulties occur only when a determination must be made concerning the inclusiveness of the phrase "to defend the Constitution." In 1929 the Supreme Court construed this phrase to include the bearing of arms in defense of this country.[72] Relying on the same construction the Court, two years later, ruled that an applicant for citizenship who made the reservation that a war be morally justified before he would participate was similarly barred.[73] A re-examination of these precedents in 1945 caused the Court to think differently. In Girouard v. United States[74] a divided Court denied that the oath of citizenship required a promise to bear arms. Justice Douglas reasoned that "one may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle."[75] Chief Justice Stone and Justices Reed and Frankfurter dissented. They contended that the failure of Congress to change the oath immediately

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[71] Immigration and Nationality Act, 66 Stat. 163 (1952).

[72] Schwimmer v. United States, 279 U.S. 644 (1929).

[73] United States v. Macintosh, 283 U.S. 605 (1931).

[74] 328 U.S. 61 (1945).

[75] Ibid., p. 64.

following the Schwimmer and Macintosh decisions, signified Congressional approval at that time.

Denaturalization. Denaturalization proceedings are justifiable if proof can be presented that original citizenship was fraudently or illegally obtained. "Denaturalization is action by the sovereign to nullify in fact a purported status of citizenship which has never existed at law."[76] Colloquially, what one has never had cannot be lost. In recent years, denaturalization has been frequently utilized as a weapon against disloyal persons. Loss of citizenship on these grounds was first used in World War I.[77] Disloyalty to the United States subsequent to acquiring American citizenship is insufficient unless it can be shown that lack of allegiance predates or occurred at the time of naturalization. It has been a long-standing requirement that a person to be eligible for citizenship must have been attached to the principles of the United States Constitution for five years prior to naturalization.[78] During the Second World War, denaturalization proceedings were frequently used in conjunction with other programs of alien control. As alien enemies divested of citizenship, persons sympathetic with the German Nazis or the Italian

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[76] John P. Roche, "Statutory Denaturalization: 1906-1951," University of Pittsburgh Law Review, 13 (1951-52), 279.

[77] Ibid., p. 314.

[78] "Developments in the Law of Immigration and Nationality," Harvard Law Review, 66 (1952-53), 707.

Fascists could then be interned for the war's duration.[79] From March 1942 to June 1944, 543 cases were taken to court to denaturalize on the basis of disloyalty, and 165 certificates of citizenship were revoked.[80] The success of such a program depended greatly upon the readiness of the courts, particularly the Supreme Court, to sanction revocation of citizenship. Yet serious obstacles were erected by the nation's highest tribunal as a result of two significant decisions in Schneiderman v. United States,[81] and Baumgartner v. United States.[82] The first of these cases involved an attempt to revoke Schneiderman's certificate of naturalization because, as a member of the Communist Party (when he was admitted to citizenship) he "had not behaved as a person attached to the principles of the Constitution of the United States."[83] The petitioner admitted membership in the Party, but denied that the organization was committed to the overthrow of the United States government by force and violence, and that he personally believed the ends of the Communist Party could be achieved within the framework of democracy. Such a position he insisted was not incompatible with the Constitution. The

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[79] D. E. Balch, "Denaturalization Based on Disloyalty And Disbelief in Constitutional Principles," Minnesota Law Review, 29 (1944-45), 405.

[80] Roche, p. 319.

[81] 320 U.S. 118 (1942).

[82] 322 U.S. 665 (1943).

[83] Schneiderman v. United States, 320 U.S. 118, 121 (1942).

Court, after a lengthy examination of Communist doctrine and the petitioner's own convictions, concluded Schneiderman had demonstrated no lack of attachment to the Constitution.

> We conclude that the government has not carried its burden of proving by "clear, unequivocal and convincing" evidence which does not leave "the issue in doubt" that petitioner obtained his citizenship illegally.[84]

Chief Justice Stone, joined by Justices Roberts and Frankfurter, dissented. They maintained that the burden of proof had been sustained. Scolding his brethren of the majority, the Chief Justice contended:

> Attachment to such dictatorship can hardly be thought to indicate attachment to the principles of an instrument of government which forbids dictatorship and precludes the rule of the minority or the suppression of minority rights by dictatorial government.[85]

In Baumgartner v. United States[86] the Supreme Court unanimously reversed a lower court ruling sustaining the denaturalization of a citizen for pro-German sentiments expressed subsequent to his admission to citizenship. To uphold this revocation, Justice Frankfurter contended, one would have to assume that statements made after naturalization accurately reflected the petitioner's state of mind at the time of acquiring citizenship.

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[84] Ibid., p. 158.

[85] Ibid., p. 187.

[86] 322 U.S. 665 (1943).

> The logical validity of such a presumption is at best dubious, even were the supporting evidence less rhetorical and more conclusive.[87]

The inescapable conclusion of these two decisions is that denaturalization will not be tolerated short of substantial evidence of lack of attachment to the Constitution prior to naturalization.[88] Subsequent conduct is a valid reason for revocation of citizenship only if it is a continuing example of disloyalty dating from the period before the granting of citizenship, and only then if the proof is "clear, unequivocal and convincing." Needless to say, the Court's position met with less than enthusiastic reception, for it in effect spelled the end of indiscriminate denaturalization.[89] The future difficulty that would be encountered in meeting the test required by the Court was succinctly summarized by a former official of the Justice Department:

> In these two cases the Supreme Court has laid down a burden of proof which is difficult indeed to meet in cases involving such intangible and indefinite matters as allegiance and attachment to constitutional principles on which concepts men's minds differ very greatly.[90]

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[87] Ibid., p. 677.

[88] Knauer v. United States, 328 U.S. 654 (1945). Here the Court sustained a denaturalization decree on the ground that there was unequivocal and convincing evidence that a naturalized citizen had been loyal to Germany before, during, and after his naturalization.

[89] Robert E. Heffernman, "Communism, Constitutionalism and the Principle of Contradiction," Georgetown Law Journal, 32 (1943-44).

[90] Balch, p. 425.

Whether concerned with evidentiary matters or statutory construction, the Supreme Court has exhibited a zealous regard for the individual's rights in denaturalization proceedings. Since 1945 the government has been victorious in only one case involving denaturalization.[91] Two naturalized citizens had been stripped of their citizenship under the Act of 1920.[92] Eichenlaub and Willumeit had been convicted of violation of the Espionage Act after their naturalization. The essential question before the Court was whether the Act of 1920 limited deportation to aliens who had never been naturalized? The majority concluded that the statute made no distinction. Aliens, whether they had never been naturalized, or had acquired and lost their citizenship, came within the meaning of the Act.[93] When a statute lacks clarity the doubts will usually be resolved in favor of the individual.[94] The government brought denaturalization proceedings against an individual and contended that in his petition for citizenship he falsely answered the following questions:

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[91] United States ex rel Eichenlaub v. Shaughnessy, 338 U.S. 521 (1948).

[92] 41 Stat. 593 (1920).

[93] In other cases dealing with statutory construction; Klapprott v. United States, 335 U.S. 601 (1948). In denaturalization proceedings the government must offer "proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearances." (p. 613). United States v. Zucca, 351 U.S. 91 (1955). Pursuant to the Immigration and Nationality Act of 1950 the filing of "an affidavit showing good cause" is a prerequisite for maintaining a denaturalization suit.

[94] Nowak v. United States, 356 U.S. 660 (1957); Maisenberg v. United States, 356 U.S. 670 (1957).

> Are you a believer in anarchy? Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?[95]

The petitioner responded in the negative, though he was at the time a member of the Communist Party. However, the Court believed that the question was ambiguous, and asserted that the petitioner could have understood the question to refer to anarchist organizations that advocated overthrow of the government. In any event, his membership in the Communist Party did not demonstrate with "clear, unequivocal and convincing" evidence a lack of attachment to the principles of the Constitution.

Denationalization. The marked differences in the Court's treatment of citizens and aliens is readily apparent from the foregoing rulings. It is necessary for the government to establish its case for denaturalization beyond a reasonable doubt. Implicit in the judiciary's reasoning is the fear that a precedent for widespread revocation of citizenship might justify the extension of these controls to native-born citizens. Even more stringent safeguards seem to exist for citizenship acquired by birth. In Nisikawa v. Dulles[96] the Court declared that involuntary military service in a foreign army during wartime does not constitute expatriation. On the same day a divided Court invalidated a section of the Nationality Act of

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[95] Nowak v. United States, 356 U.S. 660, 663 (1957).

[96] 356 U.S. 129 (1957).

1940 providing for loss of citizenship for conviction and dishonorable discharge for wartime desertion.[97] The majority concluded that the statutory provision, penal in nature, was inconsistent with the Eighth Amendment's protection against cruel and unusual punishment. Justices Frankfurter, Burton, Clark, and Harlan, in dissent, were of the view that the Congressional authority in this instance should be interpreted as an extention of the war power.

> Clearly Congress may deal severely with the problem of desertion from the armed forces in wartime; it is equally clear, from the face of the legislation and from the circumstances in which it was passed, that Congress was calling upon its war powers when it made such desertion an act of expatriation.[98]

Moreover, the four justices argued that the statute was not penal, and thus "cruel and unusual punishment" was not involved. The majority foreclosed denationalization legislation, a suggestion denied by the minority. If jus soli, jus sanguinis citizenship can be lost only through voluntary renunciation, then the Court's ruling, while decisive, does not remove all confusion. The question then arises as to what constitutes a voluntary or an involuntary act. The issue of denationalization has not been conclusively resolved. The Supreme Court has noted probable jurisdiction in a case involving another Congressional attempt at denationalization -- the revocation of

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[97] Trop v. Dulles, 356 U.S. 86 (1957).

[98] Ibid., p. 121.

citizenship of an individual who willfully absents himself from the United States during wartime to avoid the draft.[99]

Summary. Regard for the security of the United States has prompted Congress to initiate far-reaching legislation to control alien activity. The regulation is concentrated in three principal areas -- exclusion, deportation, and denaturalization. The constitutionality of all three has been sustained by the Supreme Court. A submissive Court has characterized Congress's control over the exclusion of aliens as plenary. It is doubtless true that whatever the legislature decrees for the foreigner at the gates, the courts must, within their self-imposed bounds, give assent to. Admission to the United States carries with it the guarantee of more substantial protection, particularly due process of law. Where the Supreme Court has saved a foreign subject from deportation, more often than not a denial of due process or an ultra-vires act on the part of the executive was the reason. Little comfort can be drawn, however, from these isolated instances, since the power of Congress to prescribe conditions for deportation remains unchallenged by a majority of the Court. Citizenship, once bestowed, may not be removed for insubstantial reasons. The scrupulous regard for evidence manifested by the Court has with frequency frustrated efforts at denaturalization and

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[99] Mackey v. Martinez, 359 U.S. 933 (1958). On April 18, 1960, the Supreme Court, without reaching the constitutional issue, remanded the case to the District Court for further proceedings. Mackey v. Martinez, No. 29- October Term, 1959.

denationalization.

That regulation of aliens is interrelated with the maintenance of internal security has not escaped the Court. On more than one occasion the judiciary has recognized and accepted this datum as legitimate concern of Congress, not to be lightly regarded by the judiciary. That an alien still retains an allegiance to a foreign country, however tenuous it may be, creates a reasonable presumption that his activities are worthy of scrutiny by this government, and in some cases even more serious curtailment of liberty may be necessary.

Unanimity has been lacking on the Court in these cases. Libertarian justices, such as Black and Douglas, reject harsh governmental controls that obviously offend their sense of enlightened justice. They are not loath to express their objections in strongly worded dissents. Their appeal to broad humanitarian principles, nobly and succinctly stated, made little imprint on the more practical-minded majority. It may be that American immigration and naturalization laws are illiberal, unjust, and even unenlightened. The difficulty that confronts the judiciary is its inability to agree on the alien's constitutional position in American society today. For the moment a majority of the Court is unprepared to substitute its judgment for that of Congress, admitting the injustices that exist. But perhaps, as a more basic proposition, they do not feel that the judicial process is the appropriate instrument for altering public policy enunciated and implemented by the political branches of government.

CHAPTER IV

LOYALTY

It is axiomatic that loyalty and national security are closely interrelated. A nation cannot expect to survive internal crises and external threats without the allegiance of its citizens and particularly of its public servants. This fact was clearly recognized by the framers of the Constitution when they incorporated in that document an oath for all public officials.[1] Yet loyalty is an intangible; the mere enumeration of oaths do not necessarily promise security or unswerving fidelity to the United States. There seems, however, to be something comforting in an express pronouncement of allegiance to fundamental principles upon which democratic society is built. It is not, therefore, surprising that the fears generated by alien ideologies in the past two decades have found expression in demands for orthodox acceptance of prevailing democratic views. In 1943 the Supreme Court, in a dramatic reversal of an earlier decision, invalidated a state statute compelling public school children to salute the American flag even though doing so violated their religious scruples.[2]

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[1] Article IV, Clause 3.

[2] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1942). In Minersville School District v. Gobitis, 310 U.S. 586 (1940), the Court had sustained a similar statute.

Justice Jackson denied the right of government to enforce conformity:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[3]

There are, therefore, impermissible bounds to governmental inquiry and control. The Bill of Rights guarantees freedom of belief and expression. It would seem that the fundamental individual freedom to differ, to espouse unpopular causes, requires no less protection than the public policy of encouraging loyalty.

But in recent years it has not been concern for the loyalty of the private citizen so much as for the governmental employee that has raised the most serious and perplexing constitutional problems. Victory in war, disillusionment in peace might well characterize American attitudes in the past twenty years. The capitulation of the Axis Powers in 1945 supplied only slight respite for a security-conscious government. The menacing doctrines of international Communism, with its attendant philosophy of revolution and subversion fostered fear and suspicion and shattered complacency. The manifestation of this uneasiness came in vigorous efforts to remove from the public payrolls all who professed belief in and adherence to Communist principles. As early as 1939 the Hatch Act forbade the government to hire any person

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[3] Ibid., p. 642.

who belonged to an organization that advocated the overthrow of constitutional government by illegal means.[4] Contemporaneously, the House Committee on Un-American Activities, under the chairmanship of Martin Dies, began conducting investigations into the loyalty of government employees. The revelations of this committee (whether true or not, and the evidence seems to support the conclusion that in many instances the charges were reckless and unsubstantiated)[5] played no small part in the development of a post-war loyalty security program.[6] For the most part its establishment was the responsibility of the President and his subordinates. However, Congress was not loath to act when it thought it detected executive foot dragging. A case in point involved Messrs. Lovett, Watson, and Dodd. All three gentlemen worked for government agencies. On February 1, 1943, Congressman Dies charged the three with being affiliated with Communist front organizations, and asserted that they were unfit for public service. Following a legislative investigation that essentially sustained the Congressman's allegations, the House of Representatives added an amendment to an appropriations bill cutting off the salary of the three.[7] The Senate agreed reluctantly and the President, lacking the

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[4] 53 Stat. 1147 (1939).

[5] Alan Barth, The Loyalty of Free Men (New York, Viking Press, 1951), p. 72.

[6] Thomas I. Emerson, David M. Helfeld, "Loyalty Among Government Employees," Yale Law Journal, 58 (1948), 8.

[7] 57 Stat. 450, Section 304 (1943).

item veto, signed the bill. Shortly thereafter Lovett, Watson, and Dodd challenged the law and ultimately the Supreme Court granted review.[8] The Court chose to restrict its consideration to a single question. Did the legislation constitute a bill of attainder, which Congress under the Constitution is forbidden to enact? The answer was in the affirmative. Justice Black, as spokesman for the Court, rejected the contention that the enactment was merely an appropriation matter over which Congress had complete control. The Court viewed the measure as clearly designed to force the dismissal of the employees.

The Lovett case did not bear on any constitutional right to public employment or the permissible reasons for executive dismissal on security grounds. At most the judiciary disallowed legislative dismissal of employees in the executive branch when not even the semblance of judicial proceedings had been followed.

The Constitutional Status of the Public Employee. Before considering the Court's disposition of cases dealing with government employment and security it is well to take note of the constitutional position of the public servant. It would seem that admission to government service is a privilege which may be granted or denied, subject to reasonable limitations.[9] Qualifications may be prescribed

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[8]United States v. Lovett, 328 U.S. 303 (1945).

[9]United Public Workers v. Mitchell, 330 U.S. 75 (1946). See also, Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 725 (1950). (Justice Frankfurter concurring), and Arch Dotson, "The Emerging Doctrine of Privilege in Public Employment," Public Administration Review, 15 (1955), 87. The author characterizes the position

with respect to competency, intelligence, reliability and related factors. As early as 1883 Congress established the Civil Service System in an effort to replace the spoils system with more reasonable criteria for recruiting public employees.[10] But it does not follow that the nondiscriminatory denial of employment opportunities in government is offensive to any constitutional provision. The epigram of Oliver Wendell Holmes is often mentioned to substantiate this point of view. "Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[11] To a large extent, however, this statement oversimplifies the issue and raises the problem that has confronted recent courts. It is one thing to assert that public service is not a vested right. It is quite another question to attempt to delineate the scope of protection afforded the employee in government service. As Professor David Fellman has so succinctly stated, "While there may not be in the present state of the law, any constitutional right to public employment, there is constitutional right in public employment."[12] In a very real sense the problem of the Court has been to ascertain what rights are granted the government employee against arbitrary and capricious dismissal. At

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that public employment is a privilege rather than a legal right as "unsound, unwise, and unnecessary."

[10]Civil Service Act of 1883, 22 Stat. 403 (1883).

[11]McAuliffe v. New Bedford, 155 Mass 216, 220 (1892).

[12]David Fellman, "The Loyalty Defendants," Wisconsin Law Review, (1957), 5.

the least, due process would seem to dictate elementary standards under ordinary circumstances.[13] However, national security may require considerable flexibility in authority to dismiss if the government is to protect itself from dangerous or potentially dangerour employees who are security risks.

The Federal Loyalty-Security Program. The government's loyalty-security program was instituted in 1947 by President Harry S. Truman.[14] Its purpose was to provide procedures for removing disloyal employees, and for preventing the recruitment of such individuals. Four years passed before the Supreme Court considered any aspect of the program, and its decision in Bailey v. Richardson[15] was valueless as an insight into the justices' conception of public policy versus individual rights in government employment. An evenly divided Court sustained the dismissal of Miss Dorothy Bailey because of her membership in the Communist Party.[16] As is customary in such situations no opinion was filed. The petitioner had denied membership in the Communist Party and argued that she was loyal to the United States. Nevertheless, she was discharged, largely on the basis of information provided by nameless informers, whom she was not permitted to confront or cross-

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[13] Bernard Schwartz, "The Supreme Court -- 1958 Term," Michigan Law Review, 58 (1959), 175.

[14] Executive Order No. 9835, 12 Federal Register, 1935 (1947).

[15] 341 U.S. 918 (1950).

[16] Justice Clark took no part in the consideration or decision of the case.

examine. The identity of the division on the decision was not announced, but the comments of individual justices in a later case, Joint Anti-Fascist Refugee Committee v. McGrath,[17] indicated fairly conclusively how the justices voted in the Bailey decision. Justices Douglas and Jackson left no doubt concerning their disagreement with the procedures by which Dorothy Bailey had been suspended. Douglas remarked:

> Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice.[18]

Justice Black's constitutional attack on the loyalty program and Justice Frankfurter's concern for due process in security cases strongly suggest that they, along with Douglas and Jackson, were the four who found the procedures followed in the Bailey case deficient. Because Justice Reed, Chief Justice Vinson, and Justice Minton dissented in the Refugee Committee Case, they probably voted to sustain Dorothy Bailey's dismissal. By the process of elimination, Justice Burton seems to be the fourth member of this group.

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[17] 341 U.S. 123 (1950).

[18] Ibid., p. 180. Justice Jackson remarked, "An equally divided court today, erroneously, I think, rejects the claim that the individual has hearing rights." (p. 186).

At the outset the Court had to determine the validity of standards utilized in the dismissal of government employees. The indecisiveness of the Bailey decision was compounded by the variegated views of six opinions in Joint Anti-Fascist Refugee Committee v. McGrath.[19] In essence the dispute involved the authority of the Attorney General to compile a list of organizations deemed subversive and to include organizations without the benefit of a prior hearing. The Attorney General's list was furnished to the Loyalty Review Board and in turn circulated among various governmental agencies. Employees affiliated with groups cited by the Attorney General might find their service with the government terminated. Three organizations protested their inclusion on the list[20] on the claim that they were charitable organizations. Justice Burton joined by Justice Douglas assessed the Attorney General's action as arbitrary because the listing had been completed without an "appropriate determination." The restraint with which Burton approached the issue was not shared by his colleagues. Justice Black, asserting that due process was lacking, also challenged the constitutionality of the practice involved here. "More fundamentally, however, in my judgment the executive has no constitutional authority with or without a hearing, officially to prepare and publish the lists challenged by

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[19] 341 U.S. 123 (1950).

[20] Joint Anti-Fascist Refugee Committee, National Council of American-Soviet Friendship, Inc., and The International Workers Order.

petitioners."[21] To do so, he believed, would be to enact a bill of attainder. Justice Frankfurter observed that the right to a hearing was of the essence of due process, while Justice Douglas, agreeing that notice and hearing were essential, sided with Black on the constitutional question. "I do not see how the constitutionality of this dragnet system of loyalty trials which has been entrusted to the administrative agencies of government can be sustained."[22] Justice Jackson, although he criticized the "extravagance" and "intemperance" of his brethren,[23] shared their views on the impingement of due process. The dissenters were Justices Reed and Minton and the Chief Justice. They could see no objection to a listing that carried no legal penalties. "Reasonable restraints for the fair protection of the Government against incitement to sedition cannot properly be said to be 'undemocratic' or contrary to the guarantees of free speech. Otherwise the guarantee of civil rights would be a mockery."[24] Notice and hearing were not required in circumstances where there was no loss of liberty or property; to permit the extension of these privileges "would amount to interference with the Executive's discretion, contrary to the ordinary operations of Government."[25] At least on

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[21] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 143 (1950).

[22] Ibid., p. 180.

[23] Ibid., p. 183.

[24] Ibid., p. 199.

[25] Ibid., p. 203.

one point a majority of the Court concurred. The procedures that were employed by the Attorney General were not acceptable. For four Justices due process required notice and hearing. Black and Douglas felt, additionally, that the whole program of loyalty trials was invalid, while the three dissenters justified the Attorney General's actions as a reasonable implementation of security policy. The peripheral question of confrontation at security hearings remained unclarified insofar as a majority of the Court was concerned. It is interesting to note that while this issue was raised frequently in subsequent cases, it did not again receive extensive treatment in a majority opinion until 1958.[26]

In 1955 the Supreme Court was again asked to review the classification of organizations based on their political beliefs.[27] The Communist Party was required under the terms of the Subversive Activities Control Act of 1950[28] to register with the Attorney General as a "Communist-Action" organization. A hearing was conducted by the Subversive Activities Control Board that resulted in the recommendation that the Party be registered. However, part of the evidence upon which the determination was made was offered by witnesses suspected of perjury. Thereupon the Party requested leave to

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[26] Greene v. McElroy, 360 U.S. 474 (1958).

[27] Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115 (1955).

[28] 64 Stat. 987 (1950).

file an affidavit to adduce additional evidence. The government conceded that certain witnesses were under investigation for possible perjury, but contended that on balance the evidence was sufficient to support the finding of the Board. The Court of Appeals accepted the government's position. The Supreme Court limited its inquiry to the single question of the alleged perjurious evidence and its effect on the outcome of the hearing. Justice Frankfurter, for the majority, announced:

> When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing Court to find that there is ample innocent testimony to support the Board's finding.[29]

Therefore, the case was remanded to the Board for further hearing. In dissent, Justices Clark, Reed, and Minton maintained that the credibility of the witnesses had been attacked at the initial hearings, and that the original determination should be allowed to stand. The Court majority, over the objections of the dissident Justices, avoided constitutional questions.

As cases reached the Court in the 1950's affecting the scope of the government's power to dismiss its own employees, persistent efforts were made to obtain an elucidation of the constitutional issues. Without exception these attempts failed as the judiciary

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[29] Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115, 124 (1955).

seized upon lesser grounds for resolving particular controversies. Certainly there were ample opportunities to elicit a definitive statement from the Court. The problem of nonconfrontation, for example, was evaded by the Justices in Peters v. Hobby.[30] Dr. Peters had served in a non-sensitive position as a Special Consultant to the United States Public Health Service. Several times between 1949 and 1953 he was cleared of charges that he was a member of the Communist Party. In April 1953 the Loyalty Review Board conducted an independent post-audit and concluded that there was reasonable doubt of his loyalty. Thereupon, Dr. Peters was dismissed and barred from further government service. At all of the aforementioned hearings he was denied access to the information used against him. The Court ruled that his dismissal contravened the Presidential Executive Order limiting the Board's authority to "cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency."[31] Post-audit was inconsistent with this provision. Even though Justice Black was amenable to the resolution of the case on this basis, he hastened to add:

> I wish it distinctly understood that I have grave doubt as to whether the Presidential Order has been authorized by any act of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here.[32]

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[30]349 U.S. 331 (1954).

[31]Executive Order 9835, 12 Federal Register 1935 (1947).

[32]Peters v. Hobby, 349 U.S. 331, 350 (1954).

A question of statutory construction served as the justification for avoiding constitutional issues in Cole v. Young.[33] Here a Food and Drug Inspector in New York was suspended and subsequently dismissed because of sympathetic association with Communists. As a veteran he was subject to certain protections flowing from the Veterans' Preference Act.[34] Specifically he could not be removed without cause, and he could appeal to the Civil Service Commission and its ruling would be binding. However, a law passed in 1950[35] authorized the removal of any employee whose continued presence in government service was inconsistent with the interests of national security. The Civil Service Commission contended that the 1950 legislation superseded the Veterans' Preference Act and they refused to entertain his appeal. The Supreme Court disagreed:

> We conclude (1) that the term "national security" is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the nation's safety, as distinguished from the general welfare; and (2) that no determination has been made that petitioner's position was affected with the "national security," as that term is used in the Act. It follows that his dismissal was not authorized by the 1950 Act and hence violated the Veterans' Preference Act.[36]

By basing its ruling on the meaning of national security as

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[33] 351 U.S. 536 (1955).

[34] 58 Stat. 390 (1944).

[35] 64 Stat. 476 (1950).

[36] Cole v. Young, 351 U.S. 536, 543 (1955).

understood in the 1950 Act the Court was able to avoid the delicate constitutional question of the extent of the President's removal power. In dissent, Justices Clark, Reed, and Minton construed the Act as permitting discharges without reference to the character of the position.

The Court again manifested its affinity for procedural correctness in Service v. Dulles.[37] The point in contention here was the authority of the Secretary of State to dismiss a Foreign Service Officer in violation of departmental regulations promulgated for handling security cases. Service's discharge was defended by invoking the so-called "McCarran Rider."[38] This "rider" was a Congressional enactment vesting the Secretary with absolute discretion to dismiss government employees. However, a unanimous Court chose to consider existing departmental regulations as applicable to discharges under the "McCarran Rider." If true, the petitioner's dismissal was affected without proper observance of existing regulations, notwithstanding the McCarran Rider." The Court phrased its ruling in these words:

> While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more vigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the regulations remained unchanged, proceed without regard to them.[39]

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[37] 354 U.S. 363 (1956).

[38] 65 Stat. 581, Section 103 (1951).

[39] Service v. Dulles, 354 U.S. 363, 388 (1956).

By the mid-1950's constitutional attacks on the federal loyalty-security program had failed to receive substantial attention from the Court except for the ever-present cirticisms found in dissenting opinions. As one observer noted:

> While many an epigram from the majority side has inspired condemnation of the Government's security program, a court majority in support of a successful constitutional attack upon it is still lacking.[40]

Nonetheless, the Court continued to invalidate dismissals whenever the letter of the law on departmental regulations was in any way violated.[41] In 1959 the Court was again faced with the issue of confrontation.[42] The petitioner here was an aeronautical engineer employed by a private concern under contract with the government.[43] His security clearance for dealing with classified information was revoked because of his alleged association with known Communists. The record of the hearings conducted prior to the revocation of his clearance included information supplied by confidential informants.

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[40]Robert J. Morgan, "Federal Loyalty-Security Removals 1946-1956," Nebraska Law Review, 36 (1957), 424.

[41]Vitarelli v. Seaton, 359 U.S. 535, 545 (1958). "Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fall substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect."

[42]Greene v. McElroy, 360 U.S. 474 (1958).

[43]Once before the Court had been asked to clarify the authority of private concerns to dismiss employees because of membership in the Communist Party. Black v. Cutter Laboratories, 351 U.S. 292 (1955). The Court disposed of the case as involving the construction of a local contract under local law. It did not present a substantial federal question.

Subsequently he was discharged by his employer and was unable to secure employment elsewhere. Because the petitioner's dismissal resulted directly from governmental action, he attacked the validity of the procedures followed in determining that his security clearance should be withdrawn. Questions that had remained largely dormant since the Bailey[44] and Joint Anti-Fascist Refugee[45] cases now seemed destined for judicial interpretation. In a lengthy opinion delivered by Chief Justice Earl Warren the majority skirted close to the constitutional question, but rested its decision on much narrower grounds. The controlling problem was articulated by the Chief Justice:

> Whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.[46]

Of especial interest is the Chief Justice's use of the word "traditional" in referring to the procedural rights of confrontation and cross-examination. In point of fact the Court could not refer to any

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[44] Bailey v. Richardson, 341 U.S. 918 (1950).

[45] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1950).

[46] Greene v. McElroy, 360 U.S. 474, 493 (1958).

precedents where procedural rights of confrontation and cross-examination were made applicable to the type of hearing under consideration here. A reading of previous decisions would seem to suggest that the matter was judicially unresolved. Of course, one may assume that Warren conceived of these procedural rights in the abstract. In any event eight members of the Court did agree that Congress had not authorized reliance on proceedings where the individual was not "accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest."[47] The majority refused to decide whether the President possessed inherent authority independently to create a program such as the one utilized here or whether Congressional action was necessary. Further, they refrained from ruling on "what the limits on executive or legislative authority may be."[48] Said Chief Justice Warren:

> We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.[49]

Yet, while disclaiming any intention of settling the constitutional question, one is left with the unmistakable impression that at least

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[47] Ibid., p. 502.

[48] Ibid., p. 508.

[49] Ibid.

five justices[50] were prepared to find the practices that it proscribed not only lacking in explicit executive or Congressional authorization but inherently unconstitutional.[51] The Chief Justice lent credence to this assumption when he characterized such programs as involving "doubtful constitutionality."[52] Justices Frankfurter, John Marshall Harlan, and Charles Evans Whittaker concurred in the decision of the Court but essayed to point out that they were "intimating no views as to the validity of those procedures."[53] Only Justice Clark dissented, believing that there was ample authorization. Thus, at one point he remarked sarcastically:

> How the Court can say, despite the facts, that the President has not sufficiently authorized the program is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand.[54]

Concerning the constitutional question Clark was indeed pessimistic:

> While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks

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[50] Chief Justice Warren, Justices Black, Douglas, Brennan, and Stewart.

[51] Joseph L. Rauch, Jr., "Nonconfrontation in Security Cases," Virginia Law Review, 45 (1959), 1183.

[52] Greene v. McElroy, 360 U.S. 474, 507 (1958).

[53] Ibid., p. 508.

[54] Ibid., p. 521.

> in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security.[55]

The Greene decision marks the most recent expression by the Court on the federal loyalty-security program.[56] The dicta in that case seem to portend a more sympathetic court attitude for the employee embroiled in a security trial. While the constitutionality of the security program in general has never been enunciated by the high tribunal, the Court has certainly proceeded on that assumption. By insisting on an undeviating compliance with existing procedures the Court has, with one exception,[57] invalidated all dismissals from government service in security cases.

The Taft-Hartley Non-Communist Affidavit. Post-war concern about the growth of Communist influence in the United States and its resultant effect on internal security was manifested in many quarters. Accompanying the government's institution of a program to minimize disloyalty among federal employees was the growing belief that the American labor movement was susceptible to Communist infiltration. Communist designs on labor unions have been explained in the following words:

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[55] Ibid., p. 524.

[56] Taylor v. McElroy, 360 U.S. 709 (1958). The Court held that the case was moot because the petitioner's security clearance had been restored.

[57] Bailey v. Richardson, 341 U.S. 918 (1950).

> The reasons for Communist interest in the trade union movement are obvious. First, a position as an officer in a labor union gives the Communist Party member a base of operations and an income. To the public, he is built up as a union leader rather than as a Communist. The nature of his work -- organizing, negotiating, directing strikes -- brings him close to the workers, where he can capitalize on the industrial injustices and inequities that often exist and stir up class hatred and industrial warfare.[58]

Partially to offset these potential or existing dangers the Congress in 1947 required as a part of the Taft-Hartley Act the filing of a non-Communist affidavit by all labor union officers.[59] Failure to comply with this provision, albeit carrying no criminal penalties, would result in the loss of privileges before the National Labor Relations Board. The constitutionality of this portion of the Taft-Hartley Act was affirmed by the Supreme Court in 1950.[60] The affidavit was assailed as an infringement of the First Amendment. But the government contended that the provision in no way circumscribed beliefs or freedom of expression, inasmuch as it did not punish speech or result in the removal of any individual from office. In short, the non-Communist affidavit was justified as a reasonable regulation of interstate commerce. Because Communists were committed to foster political strikes that would obstruct the free flow of commerce,

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[58] Lawrence Kearns, "Non-Communist Affidavits Under the Taft-Hartley Act," Georgetown Law Journal, 37 (1949), 297.

[59] 61 Stat. 146, Section 9(h) (1947).

[60] American Communications Association v. Douds, 339 U.S. 382 (1949).

Congress might enact legislation to prevent such occurrences. The Court, speaking through Chief Justice Vinson, agreed that Congress had not exceeded its power:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.[61]

Even admitting the indirect effect of the affidavit on freedom of speech, Congress had reasonable grounds on which to act:

> In enacting Sec. 9(h), Congress had as its objective the protection of interstate commerce from direct interference, not any intent to disturb or proscribe beliefs as such.[62]

Justice Frankfurter and Justice Jackson concurred but expressed reservations about the validity of that portion of the oath that required the affidavit to forswear belief in Communism in addition to actual membership in the party. As Jackson remarked:

> All parts of this oath which require disclosure of overt acts of affiliation or membership in the Communist Party are within the competence of Congress to enact . . . any parts of it that call for a disclosure of belief unconnected with any overt act are beyond its power.[63]

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[61] Ibid., p. 399.

[62] Ibid., p. 407.

[63] Ibid., p. 445.

Justice Black dissented and indicated that he found the affidavit, in its entirety, repugnant to constitutional principles.[64]

The disposition of the constitutional question largely removed the Taft-Hartley oath as a significant factor in Court decisions related to loyalty and security. For the reason that the oath was defensible only if the practical dangers of Communism to the labor movement were accepted, it is significant that the Court acceded to legislative concern, and gave judicial notice to the aims of the Party.

On several occasions the judiciary has disposed of jurisdictional problems accruing from the non-Communist oath. The Court maintained that the National Labor Relations Board could not proceed against an employer at the insistence of a union affiliated with the CIO when the latter had not executed the non-Communist affidavit.[65] However, Sec. 9(h) does not preclude the issuance of a complaint for unfair labor practices after the required non-Communist affidavits have been filed, even though they had not been filed when the union brought the charge.[66] Concerning other problems involving the construction of

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[64]In Osman v. Douds, 339 U.S. 846 (1949), the Court again affirmed the labor oath as it applied to membership or affiliation in the Communist Party. However, the Justices were evenly divided with respect to the provisions of the oath relating to beliefs. Chief Justice Vinson, Justices Reed, Burton, and Minton would also sustain this portion. Justices Black, Frankfurter, Douglas, and Jackson disagreed. Justice Clark took no part in the case.

[65]NLRB v. Highland Park Manufacturing Company, 341 U.S. 374 (1952).

[66]NLRB v. Dant, 344 U.S. 374 (1952). See also, NLRB v. Coca-Cola Bottling Company of Louisville, 350 U.S. 244 (1955). Employers in an unfair labor practices dispute before the NLRB may show non-compliance

this provision, the Court has held that state courts may not enjoin peaceful picketing even when the union had not filed the necessary oath,[67] and the criminal penalties provided in the Taft-Hartley Act for the filing of a false affidavit are the sole sanctions available.[68]

Passports. The loyalty oath was sustained implicitly in the case of government employees, explicitly insofar as labor union officials were concerned, and yet another extension of the oath was denied in Kent v. Dulles.[69] In recent years the State Department has made the filing on an affidavit forswearing membership in the Communist Party a prerequisite for obtaining a passport. The denial of passports to Communists or Communist sympathizers was grounded in the belief that such persons, in their travels in foreign countries, might bring harm to the United States. Thus, control over foreign travel came to be equated with domestic security.[70] The Supreme Court in the Kent case examined the source of the authority upon which the State Department purported to act in refusing passports because of alleged Communist beliefs or membership in the Communist Party. In a

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with Section 9(h) of the Taft-Hartley Act.

[67] United Mine Workers v. Arkansas, 351 U.S. 62 (1955).

[68] Leedom v. International Union, 352 U.S. 145 (1956); Meat Cutters v. Labor Board, 352 U.S. 153 (1956).

[69] 357 U.S. 116 (1957).

[70] Louis Jaffe, "The Right to Travel the Passport Problem," Foreign Affairs, 35 (1956), 18.

5 to 4 decision the Court, without reaching the constitutional issue, held that Congress had not authorized this action. Justice Douglas contended, "The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[71] Moreover:

> Since we start with an exercise by an American citizen an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.[72]

Justices Clark, Burton, Harlan, and Whittaker Dissented. They concluded that the Secretary of State had relied on existing statutory authority.[73]

The decision of the Court in the passport areas is not strange. For a careful examination of Court pronouncements in related areas reveals a pattern of judicial caution in the implementation of loyalty-security programs because of their far-reaching effect on rights of the individual. Three conclusions may be tentatively reached about the inclination of the Court. First, such programs must be clearly and explicitly authorized by the President or Congress.

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[71] Kent v. Dulles, 357 U.S. 116, 125 (1957).

[72] Ibid., p. 129.

[73] Dayton v. Dulles, 357 U.S. 144 (1957). Here the petitioner had executed the oath but he was denied a passport because of his association with suspected subversives. Using the same reasoning as in Kent, the Court concluded that the Secretary of State was without authority to deny the passport.

Inference or implied approval is insufficient. Secondly, when there is such authorization in unmistakable terms the latter of the law or regulations must be followed without deviation. Finally, and on this point some confusion still prevails, the victim of a security or loyalty hearing is entitled to some elementary protection consistent with due process of law.

State Loyalty Programs. The rapid expansion of loyalty programs since 1945 has not been confined to the federal government. States also have been cognizant of the threat posed by employees in positions of trust whose allegiance was suspect. As the federal security program progressed the States were concurrently inaugurating their own policies to insure loyalty at the local level.[74] Numerous constitutional challenges were levelled against these procedures, and the Supreme Court, aware of the momentous problems involved, extended review to a variety of loyalty programs.

The first reaction of the Court was one of tentative silence. In Parker v. Los Angeles County[75] the Court agreed as one to dismiss the writs of certiorari on the grounds that the constitutional issues were not ripe for decision. The case concerned actions brought by several civil servants to prevent the enforcement of a loyalty oath. But the Court felt that the disposition of the various questions

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[74]Robert E. Cushman, Civil Liberties in the United States (Ithaca, Cornell University Press, 1956), p. 177.

[75]338 U.S. 327 (1949).

raised was left unclear by a reading of the lower court decision. For example, there was some question as to what compulsion, if any, followed the disclosure of information required in the oaths. Likewise it was uncertain whether the lower court upheld the right of discharge. Later in Shub v. Simpson[76] the Court denied a petition for certiorari that would "advance and expedite the hearing of an appeal from a decision of the Court of Appeals of the State of Maryland affirming the denial of a petition for writ of mandamus."[77] Subsequently, the Maryland statute did reach the high court.[78] A per curiam opinion accepted the State Supreme Court's decision on the proper construction of the oath required of all candidates for public office. That interpretation, paraphrased, was that the individual had not knowingly been a member of any organization engaged in the attempt to overthrow the government by force and violence. The element of scienter was decisive, and with the assurance of the Maryland Attorney General that he would urge this construction to the proper authorities, the Court was satisfied.

The substantive issues raised by state loyalty oaths were touched

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[76] 340 U.S. 861 (1950).

[77] Ibid., p. 861. The case concerned the denial by the Secretary of State of Maryland of a certificate of nomination tendered by the Progressive candidate for Governor. The refusal was based on the failure of the petitioner to execute an affidavit as required by the Maryland Subversive Activities Act of 1949.

[78] Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56 (1950).

on only tangentially in the above cases. Beginning in 1951 a series of disputes came to the Supreme Court that went to the heart of the problem. In essence the decisions of the high tribunal fell into three major categories: loyalty oaths for government employees, teachers, and exemption on property taxes.

In Garner v. Board of Public Works[79] the Court sustained the constitutionality of a loyalty oath required by the city of Los Angeles of all public employees. The oath covered belief in the overthrow of the government by unlawful means and extended to membership in organizations that advocated such a philosophy. Justice Clark stated the portion adhered to by the majority:

> We think that a municipal employer is not disabled because it is an agency of the States from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for public service. Past conduct may well relate to present fitness; past loyalty may have reasonable relationship to present and future trust.[80]

The Court assumed that scienter was implied in the oath. Even though the oath related to past conduct the judiciary was ready to admit that the requirement was a reasonable presumption of the close connection with present fitness for public service. Unquestionably the accepted view that public service is a public trust guided the Court and afforded justification for dismissals where trust was lacking.

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[79] 341 U.S. 716 (1950).

[80] Ibid., p. 720.

One may argue, quite apart from the question of disloyalty, that the public servant who refuses to submit to inquiry concerning his trust, forfeits the usual presumption of innocence and suggest unreliability. This contention may be especially valid when the employee occupies a sensitive position.

The teaching profession has been the object of official scrutiny. Classroom teachers deal with impressionable minds, and the State has insisted that members of that exalted profession comport themselves in accordance with the highest standards of integrity and proficiency. Loyalty has been considered inextricably intertwined with these virtues:

> Teachers must possess qualifications other than academic proficiency and loyalty. Once they lose their reputation for honesty, morality, and patriotism they cannot do an efficient job in the classroom, and, hence, lack the essential qualifications for members of the teaching profession.[81]

At the same time, however, the pursuit of knowledge to which the teacher is committed, necessitates flexibility and freedom from thought control. Academic freedom has long been jealously guarded as a worthy goal of a democratic society. The difficulty of balancing these two interests has not been made easier by the fear of Communism that has been so widespread in the post-war era. To the Supreme

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[81] John Miller, "Constitutionality of Efforts to Dismiss Public School Teachers for Loyalty Reasons," Marquette Law Review, 42 (1958-59), 229.

Court fell the arduous task of attempting to find the appropriate limits of State control over the academic profession.

In 1951 the Court reviewed the New York Feinberg Law and ruled that it was constitutional.[82] The law was described by the Court:

> It is the purpose of the Feinberg Law to provide for the disqualification and removal of superintendents of schools, teachers, and employees in the public schools in any city or school district of the State who advocate the overthrow of the Government by unlawmeans or who are members of organizations which have a like purpose.[83]

The Board of Regents of the Public School System was authorized to compile a list of organizations whose beliefs and practices brought them within the terms of the Feinberg Law. The act was mainly attacked as a deprivation of freedom of speech and assembly. But Justice Minton observed that there was no interference with either right if the individual separated himself from the teaching profession. The Justice observed that no one had the right "to work for the State in the school system on their own terms."[84] There were three dissents, with Justices Black and Douglas taking sharp issue with their brethren on the constitutional question. Justice Frankfurter rested his opinion on a point of jurisdiction and did not touch the

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[82] Adler v. Board of Education of City of New York, 342 U.S. 485 (1951).

[83] Ibid., p. 490.

[84] Ibid., p. 492.

merits of the case. Thus the Court agreed that membership in an organization declared by a State law or a State agency to advocate overthrow of the Government by unlawful means was adequate cause for the dismissal of public school teachers. Yet the judiciary has held that membership must include scienter. The dismissal of teachers solely on the basis of organizational membership regardless of their knowledge of the purposes of the organization to which they belong offends due process.[85]

Equally important with membership in proscribed organizations is the State's insistence that each teacher has the obligation to respond to proper investigations into his background. The Court has chosen to interject the view of what constitutes an appropriate inquiry insofar as dismissal may consequentially follow such hearings. In Slochower v. Board of Higher Education of New York City[86] a divided Court invalidated, as a violation of due process, a provision of the New York City charter that required the summary dismissal of an official who invoked the privilege against self-incrimination. Slochower, an Associate Professor at Brooklyn College, relied on the privilege in testifying before a Congressional investigating committee. Thereupon he was discharged. The Court viewed summary dismissal based on the use of a constitutional privilege as repugnant. "At the outset we must condemn the practice of imputing a sinister

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[85] Wieman v. Updegraff, 344 U.S. 183 (1952).

[86] 350 U.S. 551 (1955).

meaning to the exercise of a person's constitutional right under the Fifth Amendment."[87] Moreover, "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."[88] Admittedly, Slochower had no vested right to be a professor, but the majority of the Court argued that a proper inquiry must be conducted in conformity with due process. The majority, it is worth noting, did not foreclose dismissal under similar circumstances where such action had been preceded by a hearing, presumably by some proper state agency, at which time the investigation would inquire into various aspects of the employee's fitness.[89] Four justices dissented in the Slochower case. Justice Reed asserted, "The fact that the witness has a right to plead the privilege against self-incrimination protects him against prosecution but not against the loss of his job."[90]

On June 30, 1958 the Supreme Court handed down decisions in Beilan v. Board of Public Education, School District of Philadelphia[91] and Lerner v. Casey.[92] The former sustained the validity of the

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[87] Ibid., p. 557.

[88] Ibid.

[89] Jon Z. Krasnowiecki, "Confrontation by Witnesses in Government Employee Proceedings," Notre Dame Lawyer, 33 (1958), 191.

[90] Slochower v. Board of Higher Education of New York City, 350 U.S. 551, 562 (1955).

[91] 357 U.S. 399 (1957).

[92] 357 U.S. 468 (1957).

dismissal of a public school teacher, the latter affirmed the discharge of a subway conductor. Both dismissals grew out of the refusal of the employees to answer questions put to them concerning their loyalty. Beilan was fired because he declined to give information to his superintendent about his loyalty or his association with a Communist organization. Justice Burton phrased the question as follows:

> Whether the Board of Public Education for the School District of Philadelphia, Pennsylvania, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States when the Board, purporting to act under the Pennsylvania Public School Code, discharged a public school teacher on the grounds of "incompetency" evidenced by the teacher's refusal of his superintendent's request to confirm or refute information as to the teacher's loyalty and his activities in certain allegedly subversive organizations.[93]

The majority saw no conflict with due process in this case. They observed that Beilan's dismissal was based on his refusal to answer the questions propounded of him and not because of disloyalty. The Pennsylvania Supreme Court had contended that wilful refusal to answer constituted incompetency, and the majority did not think that this interpretation was unreasonable.

Lerner's dismissal as a subway conductor came as a result of his refusal to answer questions put to him by his superiors about his alleged membership in the Communist Party. He relied on the Fifth

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[93] Beilan v. Board of Public Education, School District of Philadelphia, 357 U.S. 399, 400 (1957).

Amendment privilege against self-incrimination. The Supreme Court accepted the State Court's determination that the appellant was discharged because his refusal to answer the questions asked of him furnished reasonable doubt of his trust and reliability. Therefore, the majority could state that the dismissal was not based on the use of the Fifth Amendment. Simply the refusal to answer regardless of the reason cost the appellant his job, because such refusal proved that he was unreliable. The Slochower case was distinguished. Justice Harlan made the distinction:

> In Slochower such a claim had been asserted in a federal inquiry having nothing to do with the qualifications of persons for state employment, and the Court in its decision carefully distinguished that situation from one where, as here, a State is conducting an inquiry into fitness of its employees.[94]

Dissents were filed in both cases by the Chief Justice, and Justices Black, Douglas, and William J. Brennan. Their disagreement was cogently stated by Black:

> The fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or philosophy of life. The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performances in the library, and the classroom, not on her political beliefs.[95]

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[94] Lerner v. Casey, 357 U.S. 468, 477 (1958).

[95] Beilan v. Board of Public Education, School District of Philadelphia, 357 U.S. 399, 415 (1957). The latest Supreme Court decision on this issue came in Nelson v. Los Angeles County, 362 U.S. 1 (1959). Petitioner was an employee of Los Angeles County. He refused to answer questions concerning subversion before the House Committee on

On the same day that the Court rendered its decision on the two cases cited above, it also considered the validity of a California requirement that veterans file a loyalty oath as a prerequisite to obtaining property tax exemptions.[96] The appellants were honorably discharged veterans who sought to avail themselves of the exemption but refused to sign the oath. For this reason alone they were denied the exemption. The Court assumed, without deciding, that the oath was constitutional, but held that its enforcement provisions were invalid since they placed the burden of proof on the individual.

> We hold that when the constitutional right to speak is sought to be deterred by a state's general taxing program due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition.[97]

In concurrence, Justice Black took the opportunity to express his disagreement with the philosophy fundamental to this program and to others similar to it:

> I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this nation was founded and which have helped make it the greatest in the world.[98]

Un-American Activities. His refusal was in violation of California state law and instructions from his superiors. He was discharged for insubordination. The Supreme Court sustained his dismissal, and held that the California law did not violate due process.

[96] Speiser v. Randall, 357 U.S. 513 (1957).

[97] Ibid., p. 529.

[98] Ibid., p. 531.

At the same time the Court, using similar reasoning as that applied in the Speiser opinion, held that the enforcement procedures of a California oath required of churches as a condition for receiving tax exemptions was inconsistent with the Due Process Clause of the Fourteenth Amendment.[99]

Doctors, Lawyers, and Loyalty. Various professions have deemed it appropriate to insure that their integrity not be compromised by members whose conduct is not in keeping with the highest professional ethics. In accordance with this supervision, stringent requirements may be imposed for admission to the profession and discipline meted out to erring members. The medical and legal professions have been noted for their concern. The Supreme Court has usually refrained from interference in the regulation of professions. The Court has held that the suspension from practice for six months of a physician convicted of contempt of Congress for refusing to produce before a committee of Congress certain documents that had been subpoened did not violate the Constitution.[100] The legal profession, because of its concern for the loyalty of its members, has evoked several disputes. Bar examiners have been vigilant in their efforts to prevent disloyal persons from obtaining the privileges of their calling. Petitioners who have applied to practice law are required to demonstrate, in addition to a

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[99] First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1957).

[100] Barsky v. Board of Regents, 347 U.S. 442 (1953).

proficiency in the law, good moral character.[101] However, the Court has insisted that rational standards must be applied for determining what constitutes good moral character. Past membership in the Communist Party, long since ended, coupled with present evidence of integrity and competence was an insufficient reason for denying a petitioner's application to take the state bar exam.[102]

Similarly, the Court has held that a refusal to respond to questions about membership in the Communist Party does not buttress doubts about a petitioner's character and thus enables bar examiners to refuse to certify an individual to practice law when he has met all other requirements.[103] In this particular case the petitioner freely denied that he subscribed to any belief in the overthrow of the government by unlawful means. However, he declined to state for the record whether or not he was a member of the Communist Party.

One can perceive a more vigorous protection of the individual in these cases than that manifested by the judiciary in coping with public employees involved in security and loyalty programs. Perhaps the Court sees a distinction between private and public employment and feels that the latter admits of more elaborate safeguards.

Summary. The comprehensive and detailed loyalty and security

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[101] Ralph S. Brown, Jr., John D. Fassett, "Loyalty Tests for Admission to the Bar," University of Chicago Law Review, 20 (1952-53), 480.

[102] Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1956).

[103] Konigsberg v. State Bar of California, 353 U.S. 252 (1950).

programs initiated in the past fifteen years have centered judicial attention on unique and perplexing issues not easily resolved by a reliance on precedent. In fact the judiciary had remarkably little in the way of stare decisis upon which to construct a meaningful philosophy of loyalty consistent with constitutional principles. It may be true, as one observer noted, that the present loyalty programs "simply raises in a current form the age old struggle between freedom and restriction in political expression."[104] Still, the complexities of the many-sided threats imposed by totalitarian ideologies are not dismissed by neatly turned phrases. The Holmesean aphorism that there is no constitutional right to public employment avoids the fundamental problem of today. Few, if any members of the Supreme Court would deny the truth of this position. Nonetheless, there is dissension on the Court regarding rights to be accorded in public service. Perhaps there would be little reason for more than passing interest if dismissal from public service was accomplished for the traditional reasons of incompetence or wrong doing. But the current designation of "loyalty" and "security" risks implies a serious stigma. Therefore, the Court has felt constrained to examine with special care the procedures employed in separating the public servant from his livelihood and casting serious doubts on his allegiance to his country. Federal and State governments have forcefully asserted their view that internal security demands a measure of loyalty beyond

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[104] Emerson, p. 133.

the conventional standards previously expected of public servants. And if these requirements infringe on the beliefs of the individual or his freedom of expression, then he must make his choice between public service and untrammeled freedom.

The Supreme Court has not been unwilling to accede to these demands for protection that loyalty and security programs supposedly foster. They have quietly acquiesced in the federal loyalty-security policies, but concurrently they have demanded an end to procedural irregularities. Judicial affirmation of the loyalty oath has enhanced the efforts of unions to rid themselves of Communists, and has facilitated the implementation of effective methods to bar Communists from positions of trust in state governments.

Some members of the Supreme Court feel that judicial tolerance has been overextended, and the cost exacted in the name of national security too great. This libertarian view has been eloquently expressed by Justice Black:

> Loyalty oaths, as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression -- the kind of thought and expression which has played such a vital and beneficial role in the history of this nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of "loyalty" oaths; loyalty must arise spontaneously from the hearts of people

who love their country and respect their government.[105]

Despite the criticism levelled at the Court by Black and the other libertarians, there is no proclivity on the part of the Court's majority to follow the activist approach. Nor would it be correct to characterize the decisions rendered in loyalty-security cases as examples of extreme judicial self-restraint. Rather, the Court is proceeding with caution, forswearing absolutes, and seeking a clearer understanding of the type of loyalty demanded today, always cognizant of the limitations imposed in a constitutional democracy.

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[105] Speiser v. Randall, 357 U.S. 513, 532 (1957).

CHAPTER V

THE INVESTIGATORY POWER

The legislative investigation is neither a unique nor an unexplored avenue of governmental activity.[1] For years the Congress of the United States as well as the various state legislatures have relied on information derived from such investigations in order to establish an adequate basis for legislation.[2] The contemporary spate of inquiries into subversive activities is but another extension of the legislative concern for national security. As an important adjunct of the power of Congress, the investigatory process merits the respect of the courts, usually accorded in a system of separation of powers.[3] Judicial deference, however, would be

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[1]Some studies on the investigatory process include: Alan Barth, Government by Investigation (New York, The Viking Press, 1955); M. Nelson McGeary, The Developments of Congressional Investigative Power (New York, Columbia University Press, 1940); Telford Taylor, Grand Inquest (New York, Sinom and Schuster, 1955); "Congressional Investigations," University of Chicago Law Review, 18 (1951).

[2]James R. Richardson, "The Investigating Power of Congress -- Its Scope and Limitations," Kentucky Law Journal, 44 (1955-56), 322. The first Congressional investigation on record occurred in 1792. Between 1792 and 1929 Congress authorized more than three hundred investigations.

[3]J. W. Fulbright, "Congressional Investigations: Significance for the Legislative Process," University of Chicago Law Review, 18 (1950-51), 441. Senator Fulbright described the importance of legislative investigations in these words: "The power to investigate is one of the most important attributes of the Congress. It is perhaps also one of

inconsistent with constitutional guarantees if unlimited fact-finding expeditions were immune from any control. Thus the paramount issue becomes that of ascertaining the appropriate scope of the investigatory power, and this vexatious task has fallen squarely into the lap of the Supreme Court. Despite an occasional disclaimer by individual justices, the Court has insistently asserted its duty to review the actions of committees of inquiry.[4] Even so, the judiciary must guard against treading on the legitimate powers of the Congress.

Were Congressional investigations merely a matter of eliciting facts for the purpose of passing laws the Court's function would be immeasurably easier. However, the protection of the individual against unwarranted intrusion into his private affairs necessitates at the least certain minimum standards of legislative conduct. The balancing of individual versus public interests does not always commend itself to facile judicial formulas. Since 1945 the national security of the United States has been the frequent justification

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most necessary of all the powers underlying the legislative function.. The power to investigate provides the legislature with eyes and ears and a thinking mechanism. It provides an orderly means of being in touch with and absorbing the knowledge, experience and statistical data necessary for legislation in a complex democratic society. Without it the Congress could scarcely fulfill its primary function."

[4] Eisler v. United States, 338 U.S. 189, 196 (1948). Justice Jackson remarked, "I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigatory power, or to assume for the courts the function of supervising congressional committees. I should . . . leave the responsibility for the behavior of its committees squarely on the shoulders of Congress."

for the assumption of a latitudinarian concept of the investigatory power. The argument is often advanced that the government's concern for self-preservation embraces extremely broad legislative and executive authority. Because of the admitted scope of power to deal with threats to the security of the nation, a corresponding breadth of investigatory power is a prerequisite to the performance of these duties. This view has been spelled out more explicitly in a recent article:

> The basic concept of the American system, both historically and philosophically, is that government is an instrumentality created by the people, who alone are the original possessors of rights and who alone have the power to create government. It follows that this government must have and retain the power to inquire into potential threats of itself, not alone for the selfish reason of self-preservation but for the basic reason that, having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself.[5]

This line of reasoning implies a syllogistic argument that might be phrased in the following manner. Self-preservation is the most important concern of government and least amenable to judicial checks. Legislative investigations are necessary tools for acquiring information to fashion a policy of national security. Therefore, legislative investigations related to self-preservation are least amenable to judicial checks. One may quarrel with this reasoning by suggesting

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[5]Richardson, p. 332.

that the premises upon which it is based are fallacious. There was no evidence until recently that the Supreme Court, either tacitly or otherwise, gave any credence to this thesis. But the Barenblatt opinion[6] (to be considered later in this chapter) contains in its language -- implicitly at least -- the view that the judiciary is prepared to assign a higher priority to investigations that concern national security.

Legislative Investigations in Historical Perspective. In many respects the approach of the Supreme Court to legislative investigations in the 1950's was predicated on earlier court decisions. Thus the judiciary was not writing on a clean slate. There is no specific constitutional authorization for the legislative inquiry; however, such a power is supported by implication from the mandate that legislative power is vested in Congress.[7] The scope of this power was given its first extensive consideration in Kilbourn v. Thompson.[8] The House of Representatives had authorized an investigation into a "real estate pool" in which Jay Cooke and Company had a large interest. Kilbourn's refusal to testify after being subpoened by the House resulted in his punishment for contempt of Congress.[9] At issue

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[6] Barenblatt v. United States, 360 U.S. 109 (1958).

[7] United States Constitution, Article I, Section 1.

[8] 103 U.S. 168 (1880).

[9] Anderson v. Dunn, 6 Wheat 204 (1821). The power of Congress to punish for contempt was sustained.

was the question whether Congress could institute an inquiry into purely private affairs unrelated to any valid legislative transaction. The Court did not deny the intrinsic authority of Congress to investigate, but greatly qualified this power by demanding that there be an explicit relationship between such investigations and those areas in which Congress was competent to pass laws.

> We are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizens.[10]

For the first time the Supreme Court indicated that investigations undertaken by the legislature could be circumscribed. In essence the Kilbourn decision proscribed investigations into areas where Congress could not constitutionally legislate. If rigidly enforced, this doctrine might effectively curtail the scope of the Congressional inquiry. Yet not a single occasion has arisen since 1880 when the Court has applied the Kilbourn test. On the contrary there has been a noticeable dilution of the standard.

In 1927 a second landmark case dealing with Congressional investigations reached the Court. In McGrain v. Daugherty[11] the Court affirmed the authority of Congress to compel a private individual to

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[10] Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

[11] 273 U.S. 135 (1926).

appear before one of its committees and give testimony. If Kilbourn had left any lingering doubts as to the constitutionality of the investigatory power, the decision announced by Justice Willis Van Devanter in McGrain erased them.

> We are of the opinion that the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function.[12]

Furthermore, the investigation was consistent with legislative purposes; it was not simply an inquiry to serve no useful ends. Though the McGrain decision did not overrule the Kilbourn case, it did largely destroy its effectiveness, and future Courts were to pay little heed to the pronouncements contained therein. In 1952 Justice Frankfurter referred to "the loose language of Kilbourn v. Thompson, 103 U.S. 168, the weighty criticism to which it has been subjected."[13] Undoubtedly, at the base of the repudiation of Kilbourn was the belief that the standard it imposed on legislative investigations was unrealistic. Contemporary public policy forcibly demonstrates that there is little that is outside the realm of governmental activity, either directly or indirectly. Congress would not be hard pressed to justify investigations on this ground, and for the courts to interpose their conception of legitimate legislative activity might well constitute a usurpation of the prerogatives of Congress. Likewise, "the question of ascertaining the motives of Congress as a whole verges

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[12] Ibid., p. 174.

[13] United States v. Rumely, 345 U.S. 41, 46 (1952).

on the impossible."[14]

The legislative committees that delved into the problems of subversion in the 1940's and 1950's could rely on rather substantial authority as reflected in Court precedents. Valid areas of investigation included legislation,[15] "composition and order of Congress,"[16] and the legislative task was facilitated by the judicial acceptance of the contempt power.[17] In 1935 the Supreme Court had sustained the right of the Senate to initiate contempt proceedings against an individual for the destruction of papers he had been subpoened to produce before a Senate committee.[18]

Despite the judicial scrutiny given to the investigatory power there had been no case that directly involved the question of subversion before 1957. Yet perhaps public attention during the last two decades has been focused on this aspect of the Congressional inquiry more than upon any other. In particular the House Committee on Un-American Activities, created in 1938, was subjected to penetrating appraisal by lawyers and laymen alike.[19] This committee has

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[14]Avrum M. Gross, "Constitutional Law -- Congressional Investigation of Political Activity -- Watkins v. United States Reexamined," Michigan Law Review, 58 (1960), 412.

[15]McGrain v. Daugherty, 273 U.S. 135 (1926).

[16]In re Chapman, 166 U.S. 661 (1897).

[17]Anderson v. Dunn, 6 Wheat 204 (1821).

[18]Jurney v. McCracken, 294 U.S. 125 (1934).

[19]See: Robert K. Carr, The House Committee on Un-American Activities (Ithaca, Cornell University Press, 1952); August R. Ogden, The Dies Committee (Washington, Catholic University Press, 1945).

conducted an intensive, and according to its critics, a ruthless examination of subversive practices in the United States.[20] The far-ranging inquest into private associations and beliefs touching on Communism has occasioned some support, but at the same time has elicited condemnation.[21] In 1950 Senator Joseph McCarthy began a frontal assault on alleged Communism in government, and his investigations became one of the burning issues of the last decade. The emotional heat generated by the controversy over the threat of Communism even resulted in a new word for the American lexicon, McCarthyism. Generally a word of approbrium, it was used most frequently by the critics of Senator McCarthy and his methods.[22] Real concern was expressed by individuals who deprecated legislative inquisitions, guilt by association, character assasination, and the generally low level of fairness often associated with the Communist investigations.[23] At the other end of the spectrum, equally sincere Americans applauded the work of legislative investigations of Communism as a

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[20]Abe Fortas, "Abusive Practices of Investigating Committees: Methods of Committees Investigating Subversion - A Critique," Notre Dame Lawyer, 29 (1953-54), 194.

[21]See: Taylor, Grand Inquest; Corliss Lamont, Freedom Is as Freedom Does (New York, Horizon Press, 1956).

[22]W. F. Buckley, Jr., L. Brent Bozell, McCarthy and His Enemies (Chicago, Henry Regnery Co., 1954), p. 267.

[23]Robert J. Harris, "The Impact of The Cold War Upon Civil Liberties," Journal of Politics, 18 (1956), 13. See also, Nathaniel Weyle, The Battle Against Disloyalty (New York, Thomas Y. Crowell Co., 1951), p. 283.

valuable service in behalf of internal security.[24]

A new phase of the investigatory power developed during this period. Exposure came to be recognized in many circles as a desirable if not a principal goal of Congressional committees.[25] It was plausible to argue that public opinion had to be awakened to the insidious threat posed by the Communist apparatus. Therefore, committees of inquiry might legitimately undertake this task. As substantiation for this view, Woodrow Wilson's comment in his book Congressional Government was cited:

> The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.[26]

Exposure simply for the sake of exposure without any valid connection to the legislative power raises a constitutional issue because in a legislative hearing the accused is deprived of the usual procedural protections that are corollaries of the judicial process.

Investigations into Subversion. In light of these and other

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[24] Lloyd K. Garrison, "Congressional Investigations: Are They a Threat to Civil Liberties?" American Bar Association Journal, 40 (1954).

[25] Sanford M. Gage, "Constitutional Limitations Upon Congressional Investigations," UCLA Law Review, 5 (1958), 652.

[26] Woodrow Wilson, Congressional Government (4th ed., Boston, 1887), p. 303.

considerations it is not surprising that the investigatory power should again become a point of contention in the courts. What is somewhat surprising is the hesitancy manifested by the Supreme Court in coming to grips with the bold assertion of power claimed by some Congressional committees.[27] In 1952 the Supreme Court decided the case of United States v. Rumely.[28] While not concerned with the question of subversion, the opinion did mark the first occasion in recent years on which the Court had examined the scope of authority of a particular committee. Edward A. Rumely, executive secretary of an organization known as the Committee for Constitutional Government, refused pursuant to a subpoena to disclose certain information about the organization. Subsequently, he was convicted of contempt of Congress.[29] The committee had been authorized to conduct hearings on lobbying activities. Justice Frankfurter spoke for the Court and denied that the resolution authorizing the investigation encompassed

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[27] United States v. Josephson, 165 F. 2d 82 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948); Barsky v. United States, 167 F. 2d 241 (D.C. Cir. 1948), cert. denied, 334 U.S. 843 (1948).

[28] 345 U.S. 41 (1952).

[29] 2 U.S.C. Sec. 192 (1958). "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

the information withheld by Rumely. By basing its decision on the premise that the committee exceeded its authority, the Court avoided the basic problem of delineating the power of Congress to confer on the committee the authority which it sought to exercise. The concurring Justices, Douglas and Black, were not so reticent to confront the constitutional issue. The two Justices reasoned that Congress could not investigate in areas where it lacked constitutional power to legislate, and the subject-matter of the investigation constituted a violation of freedom of speech and press in contravention of the First Amendment. The impact of the Rumely decision was to serve as a warning to committees that they must scrupulously adhere to the subject-matter under their jurisdiction. As Alan Barth noted, "It is one thing to strip Congress of its investigatory power and quite another to strip a committee of power which Congress never delegated to it. There would be no judicial usurpation in the latter form of judicial censure."[30] Even so, the content of authorizing resolutions might not always afford clear evidence of the intent of Congress, additionally, one could reasonably argue that in the absence of obvious ultra vires acts the Court would have to depend on its own conception of the appropriate scope of the committee's jurisdiction.

Once an investigating committee's jurisdiction has been defined, the questions propounded of witnesses must be pertinent to the subject under inquiry.[31] No witness can be punished for contempt if his

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[30] Barth, p. 26.

[31] 2 U.S.C. Sec. 192 (1958).

failure to respond to the interrogation of the committee is based on want of pertinency. This ground can be a substantial protection to witnesses particularly when the committee's quest is for information in the broad and oftentimes undefined area of "un-American" activities. In Watkins v. United States[32] the Supreme Court essayed to resolve the intricate problems of pertinency. Watkins appeared before a subcommittee of the House Committee on Un-American Activities on April 29, 1954. Ostensibly the investigation in progress was designed to educe information about Communism and the labor movement. Watkins had a background of participation in labor unions. He readily denied to the committee that he had ever been a card-carrying Communist. But he refused to indicate whether he was familiar with the political activities of other persons purported to be Communists. Specifically, Watkins declined to divulge whether he knew these individuals or whether to his knowledge they were affiliated with the Communist Party. His refusal was based on the contention that such information was beyond the scope of the committee's inquiry. Watkins was adjudged in contempt of Congress. The Court of Appeals at first reversed the conviction, but on rehearing affirmed, and the Supreme Court granted certiorari.

Watkins' conviction was reversed by the Court on the grounds that the questions asked of him were not pertinent to the matter under examination. Chief Justice Warren's opinion went beyond this

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[32] 354 U.S. 178 (1956).

issue and ranged over the whole spectrum of the investigatory power. At the outset Warren echoed the shibboleth that investigations must be related to the function of legislation. "We have no doubt," he observed, "that there is no congressional power to expose for the sake of exposure."[33] Moreover, the scope of a particular committee's authority is found in its authorizing resolution, and that document must be precise in its language. Judging from this criterion the Un-American Activities Committee was lacking in sufficiently explicit directions. "Who can define the meaning of Un-American?,"[34] challenged the Chief Justice.

> When the definition of jurisdictional pertinency is as uncertain and wavering as in the case of the Un-American Activities Committee, it becomes extremely difficult for the committee to limit its inquiries to statutory pertinency.[35]

In order to answer questions a witness must be apprised of the nature of the investigation "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[36] In the circumstances of this case the inquiry was supposed to be that of Communism and labor. Yet, when the petitioner was presented with a list of thirty names to identify as to whether or not they were Communists it was discovered that seven

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[33] Ibid., p. 200.

[34] Ibid., p. 202.

[35] Ibid., p. 206.

[36] Ibid., p. 209.

were totally unconnected with the labor movement. Therefore, the Court reasoned that Watkins could not know what the question under inquiry was nor how the specific questions were pertinent. The Chief Justice said the investigating committees had a clear obligation to inform the witness of the pertinency of the questions.

> Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.[37]

None of these requirements had been met to the satisfaction of the Court; therefore, Watkins' conviction was reversed. Only Justice Clark dissented and noted, "I think the Committee was acting entirely within its scope and that the purpose of its inquiry was set out with 'indisputable clarity.'"[38]

The proponents of a broad investigatory power could take little comfort from the Watkins decision. Doubtless one can read the opinion without a sense of alarm if he ignores the dicta, but it is precisely in these statements that the Chief Justice goes to the greatest length to undermine the scope of authority possessed by the Un-American Activities Committee. As one commentator observed:

> If the Court in Watkins did not expressly say that

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[37] Ibid., p. 215.

[38] Ibid., p. 227.

> it struck down the resolution for vagueness, it went to great lengths in citing vagueness for naught.[39]

The investigatory power of the states was significantly attenuated in Sweezy v. New Hampshire[40] decided the same day as Watkins. The New Hampshire legislature authorized the State Attorney General to make an investigation of subversive activities. Sweezy made two appearances before the Attorney General. On the first occasion he denied having ever been a member of the Communist Party. However, he stated that he would not answer any questions about the Progressive Party of New Hampshire or any of its members, asserting that this line of interrogation was not pertinent to the inquiry. In his second appearance Sweezy again declined to discuss the Progressive Party. Additionally, he refused to disclose the subject-matter of a lecture he had delivered at the University of New Hampshire. When he declined to answer these same questions before the State Superior Court, he was held in contempt and was ordered jailed until the contempt was purged. The Supreme Court viewed the investigation as having deprived Sweezy of due process of law. The state legislature had defined a subversive as any person who "by any means, aids in the commission of any act intended to assist in the alteration of the constitutional form of government by force and violence."[41] Chief

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[39] Joel L. Fleishman, "Constitutional Law -- Investigations -- Contempt of Congress," North Carolina Law Review, 36 (1957-58), 483.

[40] 354 U.S. 234 (1956).

[41] Ibid., p. 246.

Justice Warren dismissed this classification as too broad for the reason that it made no distinction between innocent and knowing action. Even more importantly, however, the investigation impinged two basic individual liberties, political expression and academic freedom. "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which government should be extremely reticent to tread."[42] The Attorney General's sweeping and uncertain mandate, and the lack of unequivocal evidence that the State legislature sought the information requested of Sweezy, was treated by the Court as supplementary reasons for reversing the contempt conviction. Justices Clark and Burton dissented. They contended that the right of the State to investigate subversive activities outweighed any privileges that Sweezy might assert.

The effect of the Watkins and Sweezy decisions was to reaffirm the principle that legislative investigations were not immune from judicial control. The issues raised in the two opinions were not novel, but the judicial pronouncements did seem to curtail the power of investigation.

Legislative hearings are not conducted as an unlimited inquisition into any and all areas. They are clearly confined to certain subject areas as authorized by Congress and questioning of witnesses

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[42] Ibid., p. 250.

must be relevant to the subject-matter under inquiry.[43] While no new constitutional ground was broken, the application of these limitations to Communist investigations seemed to indicate that so far as the Court was concerned the character of the investigation would not materially effect the outcome. Perhaps the most significant point in the Watkins opinion was the bold attack on the authorizing resolution that created the Un-American Activities Committee. The Court found it entirely too vague. The standard of "undisputable clarity" would seem to be difficult to follow so long as Congress conceives of the threat of subversion as being general. Justice Clark took notice of this fact in his dissent. "In the conduct of such a proceeding it is impossible to be as explicit and exact as in a criminal prosecution."[44]

As it happened, the fears expressed about the ultimate effect of Watkins and Sweezy were largely dissipated two years later in Barenblatt v. United States[45] and Uphaus v. Wyman.[46] The broad sweep of the Court's earlier opinion was to a considerable degree refined by the more limited decisions in these two cases. Lloyd Barenblatt

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[43] Sacher v. United States, 356 U.S. 576 (1957). The Court struck down a contempt conviction because of lack of pertinency. Also, Scull v. Virginia, 359 U.S. 344 (1958). A contempt conviction resulting from a refusal to answer questions before a State legislative investigating committee was reversed because of lack of pertinency.

[44] Watkins v. United States, 354 U.S. 178, 225 (1956).

[45] 360 U.S. 109 (1958).

[46] 360 U.S. 72 (1958).

was subpoened by the Un-American Activities Committee in connection with its investigation into Communist infiltration in education. His refusal to answer questions relating to his membership in the Communist Party resulted in a contempt conviction. Justice Harlan stated the question before the Supreme Court:

> Whether petitioner could properly be convicted for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities of educational institutions in this country.[47]

In responding in the affirmative the majority gave careful consideration to three aspects of the investigatory power. First, Harlan examined the scope of the committee's authority to compel testimony. Rule XI, which outlined the jurisdiction of the Un-American Activities Committee might be less than explicit, but the language of the resolution when viewed from the standpoint of legislative history furnished ample justification for the present inquiry. "In light of this long and illuminating history, it can hardly be seriously argued that the investigation of Communist activities generally, and the attendant use of compulsory process, was beyond the purview of the committee's intended authority under Rule XI."[48] The legislative gloss of Rule XI, Harlan averred, failed to indicate that the field of education was excluded from investigation. "In the framework of

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[47] Barenblatt v. United States, 360 U.S. 109, 115 (1958).

[48] Ibid., p. 121.

the Committee's history we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable . . ."[49] It is indeed difficult to reconcile Harlan's reliance on legislative gloss in the instant case and Warren's insistence in the Watkins case that the purpose of the investigation be specified with "unmistakable clarity." It was now apparent that the Chief Justice's assertions had not carried weight with the majority of the Court on this point. Harlan distinguished the Watkins and Barenblatt decisions and he did so from the standpoint of pertinency. Barenblatt had not made specific objection to the questions asked of him on the basis of pertinency whereas Watkins had. The Court contended, furthermore, that in the present case the interrogation was clearly pertinent to the matter under investigation, and Congress had authorized such an inquiry tacitly, if no more, by its repeated mandate to the Committee to conduct hearings on the threat of Communism in the United States. A comparison of the two cases leaves no doubt that the holding in the Watkins case was quite restricted, and Warren's condemnation of other aspects of the investigatory power was for the most part dicta.[50]

Having agreed that this particular inquiry was authorized by Congress and the questions pertinent, the Court proceeded to the more

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[49] Ibid., p. 122.

[50] Bernard Schwartz, "The Supreme Court -- 1958 Term," Michigan Law Review, 58 (1959), 168.

fundamental issue of constitutionality. Could the committee, consistently with the First Amendment, inquire into past or present membership in the Communist Party? The Court's answer turned on a balancing of individual versus public interests:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the Courts of the competing private and public interests at stake in the particular circumstances shown.[51]

What had to be balanced here was the public right to inform itself about a grave threat to its security and the private claim to silence. Harlan stated that the power of Congress to legislate in the area of Communist activity "rests on the right of self-preservation."[52] Therefore, by implication, investigations of Communism should be accorded substantial weight even if individual liberties suffer some infringement. For the Communist Party cannot be considered as just another political party. Its philosophy indicates a disregard of constitutional procedures. As Harlan stated:

> To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary politcal party from the standpoint of national security, is to ask this court to blind itself to world affairs which have determined the whole course of our national policy since the close of

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[51] Barenblatt v. United States, 360 U.S. 109, 126 (1958).

[52] Ibid., p. 128.

World War II . . .[53]

The majority rejected the argument that the present inquiry was undertaken for the sole purpose of exposure. Undoubtedly, exposure might be a consequence of such hearings, but if Congress was exercising its constitutional power it was immaterial what the legislative motives were. Justice Black, joined by the Chief Justice and Justice Douglas, dissented. Black flatly rejected the idea that First Amendment freedoms were subject to compromise through any judicial balancing. Justice Brennan dissented separately because he considered that the investigation was conducted solely for exposure.

It was suggested earlier in this chapter that legislative investigations concerning subversion might be accorded a greater latitude than other inquiries. The Court's decision in Barenblatt lends emphasis to this contention. The balancing formula enunciated by Justice Harlan was clearly designed to grant a wider scope of power where Communist activities were involved. If Congress is permitted broad power to legislate in the domain of national security, then the public interest dictates broad inquiries to aid in the promulgation of this authority. It does not seem unreasonable to read the Barenblatt decision as clothing legislative investigations into subversion with a greater authority than other inquiries. Or, in any event, the opinion implies that the balancing process will be

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[53] Ibid., p. 129.

weighted in favor of the government in similar cases.

Judicial balancing was applied by the Supreme Court to state investigations in Uphaus v. Wyman.[54] The State of New Hampshire was the party. Uphaus was Executive Director of World Fellowship, Inc., an organization under investigation by the State Attorney General. Uphaus refused to produce records about the organization and he was held in contempt. His defense was based on three grounds: (1) The Resolution under which the Attorney General was authorized to operate was vague: (2) the documents sought were not pertinent to the investigation; and (3) enforcement of the subpoena would violate freedom of speech and association. In addition, the appellant argued that Pennsylvania v. Nelson[55] had preempted the field of state subversive legislation and therefore state investigations related thereto. Justice Clark disposed of this contention by defining the scope of the Court's decision in Nelson:

> All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a state could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows a fortiori.[56]

Thus the single question was that of determining whether New Hampshire's interests were sufficiently substantial to justify the

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[54] 360 U.S. 72 (1958).

[55] 350 U.S. 497 (1956).

[56] Uphaus v. Wyman, 360 U.S. 72, 76 (1958).

disclosure of the records sought and thereby impinge individual freedom. The Attorney General could reasonably believe that the production of the documents would materially aid the State's lawful inquiry about subversion. Moreover, it was of no avail to find the inquiry invalid on the ground of exposure. Clark remarked, "exposure -- in the sense of disclosure -- is an inescapable incident of an investigation into the presence of subversive persons within a State."[57] Taking into consideration the competing interests the majority observed:

> In the light of such a record we conclude that the State's interest has not been "pressed in this instance to a point where it has come into fatal collision with the overriding "constitutionally protected rights of appellant and those he may represent.[58]

The dissent, penned by Justice Brennan for himself, the Chief Justice, and Justices Black and Douglas covered essentially the same objections that they had raised in Barenblatt.

Analysis of Sweezy and Uphaus offers little in the way of differentiation. Apparently the State had made a stronger claim for the information it sought in the latter case and so the balance swung in favor of the public interest. Professor Henry Hart saw the distinction in the subject matter of the investigations:

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[57] Ibid., p. 81.

[58] Ibid.

> It is difficult to reconcile Uphaus and Sweezy unless a greater weight is accorded in the first-amendment balancing process to political and academic freedoms than to freedom of association not directly involving political or academic activities.[59]

The Privilege Against Self-Incrimination. The witness before a Congressional investigating committee may find it increasingly difficult to rely on pertinency and constitutional grounds to avoid giving information. There remains one defense that the courts have recognized as valid under certain circumstances: the privilege against self-incrimination.[60] The utility of this provision may in the last analysis be self-defeating even if a witness successfully establishes the incriminating nature of the questions asked in Court proceedings for contempt. For in the minds of the public, reliance on the privilege is frequently taken as conclusive evidence of guilt.[61] Where the inquiry concerns Communist activities the damage to the reputation of the witness who avails himself of the Fifth Amendment in all likelihood may outweigh the advantages derived by freeing himself from compulsory testimony. The term "Fifth-Amendment Communist" has been cynically applied by legislators and laymen alike to those who refuse to respond to questions about

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[59] Henry M. Hart, "The Supreme Court, 1958 Term," Harvard Law Review, 73 (1959), 162.

[60] Fifth Amendment, "No person . . . shall be compelled in any criminal case to be a witness against himself."

[61] Erwin N. Griswold, The Fifth Amendment Today (Cambridge, Harvard University Press, 1955), p. 56.

Communist affiliations.[62]

The Supreme Court has accepted the plea against self-incrimination as justifiable when questions are asked before a legislative inquiry about employment in the Communist Party.[63] The answers might furnish "a link in the chain of evidence" leading to prosecution under the Smith Act.[64] But the witness must be careful that he equips himself with the privilege at the proper moment. The privilege must be invoked at the outset; if not invoked it is considered waived. Later reliance on one privilege as a "pure afterthought" is insufficient.[65] It is equally important for the committee to inform the witness of its refusal to accept his plea of self-incrimination or lack of pertinency.[66] At times it may appear dubious whether or not an individual is using the privilege against self-incrimination as the reason for declining to answer the questions of a Congressional committee. However, no particular verbal formula is necessary so long as the words of the witness make it clear that he is taking the privilege. Reference to the Fifth Amendment is adequate for these purposes.[67]

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[62] Ibid., p. 69.

[63] Blau v. United States, 340 U.S. 159 (1950).

[64] Ibid., p. 161.

[65] Rogers v. United States, 340 U.S. 367 (1950).

[66] Bart v. United States, 349 U.S. 219 (1954).

[67] Emspak v. United States, 349 U.S. 190 (1954); Quinn v. United States, 349 U.S. 155 (1954).

Immunity. It is small wonder that investigatory bodies should feel frustrated by the self-incrimination provision, especially when it protects the witness from giving information deemed vital to the national security. So long as an individual makes use of the privilege and the questions are incriminating there appear to be only two viable alternatives. The inquiry may be directed into other areas with reliance on sources of information which are not privileged, or immunity from prosecution may be granted, thereby freeing a witness from any fear that his disclosures will later be used against him in criminal proceedings. For obvious reasons, the latter course is preferable -- assuming that the information desired is sufficiently valuable to warrant protection against prosecution. Federal immunity statutes hold special appeal for those who insist that the dangers of subversion are real and substantial. Immunity granted by any statute must be complete -- that is it must save the witness from any future prosecution based on evidence he has supplied while under the protection of immunity, otherwise the Fifth Amendment cannot be displaced and the witness forced to respond.[68] To offset the obstruction to investigations in the field of national security, Congress passed a comprehensive Immunity Act in 1954.[69] If the information desired of a particular witness was considered essential, an application might be made to the Courts to grant immunity and compel

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[68] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[69] 68 Stat. 745 (1954).

cooperation of the recalcitrant witness. In Ullmann v. United States[70] the Supreme Court, with Justices Douglas and Black dissenting, sustained the constitutionality of the Immunity Act. The Court reasoned that the immunity provided by the statute was broad enough to afford the protection that would otherwise be included within the privilege. The paramount interest of the nation had to be taken into account in the extension of immunity from State prosecution.

> The Immunity Act is concerned with the national security. It reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution.[71]

Frankfurter further remarked:

> We cannot say that Congress' paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of state power for the more effective exercise of conceded federal power.[72]

However, the Immunity Statute did not prevent the loss of one's reputation, even though it saved him from criminal prosecutions, and for the dissenters it was equally important to safeguard "the conscience and dignity of the individual."[73]

> When public opinion casts a person into the

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[70] 350 U.S. 422 (1955).

[71] Ibid., p. 436.

[72] Ibid.

[73] Ibid., p. 449.

> outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.[74]

It seems reasonable enough to argue as the Court did that "once the reason for privilege ceases, the privilege ceases."[75] If a person cannot be incriminated by the statements he makes, and the information he possesses is vital to the national security, the courts are not barred from compelling testimony. The fact that the judiciary is willing to sanction coerced testimony provided adequate safeguards are present is further confirmation of the retreat from inflexible judicial standards. Silence is not constitutionally protected in areas of legitimate legislative inquiry.[76] Even the plea of self-incrimination will not stand against comprehensive immunity from prosecution.

Miscellanea. Thus Congressional committees and other valid inquiries perform their duties with a minimum of serious judicial interference. So long as the committee adheres to its subject-matter, it is left relatively free to seek relevant information. The

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[74] Ibid., p. 454.

[75] Ibid., p. 439.

[76] Raley v. Ohio, 360 U.S. 423 (1958). Witnesses before a State investigating committee were informed that they could avail themselves of the privilege against self-incrimination. The Ohio Supreme Court ruled that they were covered by an immunity statute and therefore should have responded to the questions. The United States Supreme Court reversed the contempt convictions on the ground of entrapment.

procedures by which investigating committees operate are usually left to Congress to define. The absence of a quorum, however, may impair the validity of a perjury conviction growing out of testimony before a legislative inquiry.[77] By the same standard the Court has insisted that a witness will not be held in default of a committee order to produce records in the face of ambiguous instructions from the chairman.[78]

Summary. The power of Congress to investigate was acknowledged by the courts as a logical extension of the power to legislate long before the current preoccupation with subversion. Definite limitations had also been noted by the courts. Principally, these restrictions relate to the permissible areas of investigation, and the extent of authority of particular committees investigations.

It has been suggested that most recent inquiries dealing with Communism are not so much designed to elicit information in the aid of legislation as to seek to expose. Whereas exposure is not regarded as a legitimate objective when standing alone, the perplexing question is how is it possible to ascertain the motives of Congress? The judicial dilemma has not been made easier by the conflicting evidence of what a particular committee is attempting to accomplish.

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[77] Christoffel v. United States, 338 U.S. 84 (1948). See also, United States v. Bryan, 339 U.S. 323 (1949); United States v. Fleishman, 339 U.S. 349 (1949). The question of the lack of a quorum must be raised at the outset and not at some future time.

[78] Flaxer v. United States, 358 U.S. 147 (1958).

The statements of individual members frankly admitting the desirability of exposure must be weighed against the purposes of the investigation as envisaged by Congress. The Court has apparently resolved this issue by simply withdrawing from the nebulous sphere of intent. The majority has rationalized its approach to the problem by distinguishing between motive and result. Undeniably Congressional investigations have resulted in exposure, but if such was the incident of a lawful exercise of Congressional authority, then the remedy lies with Congress and not with the courts. Apparently the Court will not intervene unless there is an obvious and glaring abuse of authority by either the Congress or one of its committees. The import of this judicial legerdemain is to forestall effectively interference in the operation of inquiries into subversion, and to eliminate the issue of exposure as a efficacious device to limit such investigations. On this question, however, there is by no means unanimity. An active and vocal minority composed of Chief Justice Warren, and Justices Black, Douglas, and Brennan, still maintain that the judiciary should not be so cautious in declaring investigations invalid where exposure seems to be the principal purpose.

The Court has displayed a similar reticence in coping with constitutional attacks on the power of Congress and the States to investigate in areas that touch on First Amendment freedoms. The "balancing process" referred to in the Barenblatt decision sounds very much like judicial expediency. The Court was evidently unwilling to abandon the review of investigations altogether. But in attempting

to devise a standard for providing some protection to the individual the judiciary may have done no more than formulate a convenient maxim for justifying practically any inquiry relating to national security. Given the character of the Communist threat, it is difficult to imagine circumstances under which the individual could reasonably argue that his rights deserve primacy. In the application of this test it may be suggested that some freedoms are to be protected at the expense of the investigatory power, but such would be the case only if Congress through faulty resolutions failed to specify with some degree of clarity the nature and importance of the inquiry. It would be premature and impertinent to assess the role of the courts vis-a-vis the investigatory process on the basis of its few decisions of the 1950's. World conditions may change and new personnel on the Court in the future could impose more stringent controls on the investigatory power. As of 1960, however, this power is broad -- as broad as the power to legislate. And where self-preservation is at stake, history teaches that the judiciary moves, as it should, with circumspection.

CHAPTER VI

ESPIONAGE AND SUBVERSION

Nothing imperils the security of the United States more decidedly than espionage and subversion. These twin threats to the safety of the nation call into being the full resources of the federal government and are sanctioned by public opinion as a logical assumption of sovereign powers. Few would quarrel with an alert and intensive campaign to rid the country of subversive elements. During actual hostilities espionage is an ever-present threat, and often entails limitations on civil liberties that would otherwise be unthinkable. The reckless use of power can, however, create an atmosphere of hysteria in which the unorthodox is equated with the disloyal. In the interlude between the two world wars the Supreme Court had become increasingly involved in the question of individual liberties -- especially after 1937 when the Court forsook its role as economic censor of the nation. The outbreak of World War II found the American people more "civil liberty conscious" than ever before.[1] For the most part, American experience in dealing with espionage and subversion from 1941 to 1945 created fewer infringements

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[1] Robert Cushman, "Civil Liberties," American Political Science Review, 37 (1943), 49.

of individual liberty than during World War I.[2]

In many respects the decade and a half since the end of hostilities has brought to the forefront the most perplexing constitutional questions relating to internal subversion ever to confront the Court. This era was characterized by the growing disenchantment with the Soviet Union in international affairs and a corresponding concern for the activities of Communists in this country. A more sophisticated and subtle threat to the nation's security became evident. The emphasis was not on direct subversion, but infiltration for the purpose of gradually undermining American institutions.[3] Often the danger was not readily apparent; therefore, the means to cope with it had to be selected with care. Overt acts of sabotage can be dealt with and no substantial constitutional question is raised. But when the threat is indirect and on the surface appears to be no more than the exercise of lawful privileges, the democratic state finds itself confronted with the fundamental issue of resolving conflicting interests. Such a balance must be maintained without sacrificing either security or liberty. In large measure this adjustment has been one of the major problems of the Supreme Court during the past

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[2]Osmand K. Fraenkel, "War, Civil Liberties and the Supreme Court 1941 to 1946," Yale Law Journal, 55 (1945-46), 718.

[3]Communist aims are dealt with in the following: Edward E. Palmer, ed., The Communist Problem in America (New York, Thomas Y. Crowell Company, 1951); Nathaniel Weyl, The Battle Against Disloyalty (New York, Thomas Y. Crowell Company, 1951); James Burnham, The Web of Subversion (New York, The John Day Company, 1954).

twenty years. This chapter will examine the judicial disposition of controversies emanating from the government's efforts to cope with subversion and espionage. In particular the Japanese exclusion cases, espionage and treason, and the judicial interpretations of the Smith Act merit consideration and analysis.

Exclusion, Evacuation and Relocation. On June 21, 1943 and December 18, 1944 the Supreme Court delivered four opinions concerning three aspects of the federal government's program of supervision of citizens of Japanese ancestry on the west coast.[4] The wisdom and justification of the government's actions during the early stages of the Second World War has evoked a plethora of comments.[5] From a constitutional standpoint the decisions of the Court in these cases hold importance not only for the late war but also contain implications for the future. Therefore, a detailed analysis of the reasoning of the Court is necessary.

The devastating suddenness with which Japanese bombs rained on Pearl Harbor in the early dawn of December 7, 1941 left the American

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[4] Hirabayshi v. United States, 320 U.S. 81 (1942); Yasui v. United States, 320 U.S. 115 (1942); Korematsu v. United States, 323 U.S. 214 (1944); Ex parte Mitsuye Endo, 323 U.S. 283 (1944).

[5] See: Jacobus tenBroek, et. al., Prejudice, War and the Constitution (Berkeley, University of California Press, 1958); Dorothy Swaine Thomas, Richard S. Nishimoto, The Spoilage (Berkeley, University of California Press, 1946); Nanette Dembitz, "Racial Discrimination And the Military Judgment: The Supreme Court's Korematsu and Endo Decisions," Columbia Law Review, 45 (1945); Eugene Rostow, "The Japanese American Cases -- A Disaster," Yale Law Journal, 54 (1944-45).

people bewildered and frightened. Secure behind what they had thought were two impenetrable oceans, this country as a whole had demonstrated little concern for the menacing military might accumulating off the shores of Asia. But that security and complacency was shattered in a few short hours, and war became a reality for the second time in fewer than fifty years.

Several thousand citizens of Japanese descent resided on the west coast at the time of the attack on Pearl Harbor.[6] The wave of hysteria subsequent to December 7 extended to and encompassed everything Japanese, even including Japanese-American citizens. Immediately in the minds of many, these people were viewed as a potnetial threat to the security of the United States.[7] If not prepared to engage in outright collaboration with the enemy, there was at least a strong suspicion that their loyalty was not above question. The distinct and nonassimilable character of the Japanese-Americans was stressed as substantiation for their lack of attachment to the American cause.[8] As the Japanese military machine marched relentlessly through South Asia the atmosphere in California, where the largest number of Japanese-American citizens lived, became increasingly tense. Cries for action to control these groups became more vocal. These were not isolated voices, but included prominent

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[6] tenBroek, p. 99. The number cited here is 112,000.

[7] Ibid., p. 70.

[8] Ibid., p. 74.

citizens in all walks of life.[9] Soon the military voice was added to the growing clamor for action. General John L. De Witt, the commander of the west coast area, was desirous of authority to establish zones from which citizens could be excluded.[10] Such authority was granted on February 20, 1942 in the form of a Presidential Order.[11] The proclamation permitted the Secretary of War, or military commanders designated by him, to establish areas of exclusion. Individuals within these designated areas would be subject to such rules and regulations as prescribed by the appropriate military commander. Clothed with this grant of authority, General De Witt proceeded to issue a series of orders for the purpose of carrying out the provisions noted above.[12] In March, 1942 Congress, at the request of the executive department, approved the President's action. The legislature enacted a law making it a misdemeanor to violate the regulations issued in pursuance of Executive Order 9066.[13] A few days following the Congressional action the President established the War Relocation Authority.[14] This body was entrusted with the supervision of the program of resettlement of persons evacuated from west coast areas.

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[9] Ibid., p. 83.

[10] Ibid., p. 110.

[11] Executive Order No. 9066, 7 Federal Register 1407 (1942).

[12] tenBroek, p. 116.

[13] 56 Stat. 173 (1942).

[14] Executive Order No. 9102, 7 Federal Register 2165 (1942).

The first test of the constitutionality of restrictions imposed on Japanese-Americans arose in Hirabayashi v. United States.[15] Hirabayashi was convicted in the federal district court for refusing to comply with curfew regulations issued for certain areas. Moreover, he refused to report to a Civil Control Center preparatory to his exclusion from the area. The Court of Appeals certified questions to the Supreme Court and the latter granted certiorari to review the entire proceedings. The appellant raised several points. He argued that the act of March 1942 represented an unconstitutional discrimination against citizens of Japanese descent in violation of the Fifth Amendment. On this latter point reasonable men could and did disagree. Justice Murphy was to raise this issue with considerable vehemence in later cases. It would be difficult to ascertain to what extent the west coast orders were the product of military necessity or simply the result of inflamed antagonism against certain racial groups. In any event the Court was on safer, if not sounder grounds, in relying on military necessity as a justification for these extreme measures. The judiciary rejected the arguments of Hirabayashi and held for the government. The Court asserted that it was "evident from the legislative history that the Act of March 21, 1942 contemplated the curfew order which we have before us."[16] Moreover:

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[15] 320 U.S. 81 (1942).

[16] Ibid., p. 89.

> The question then is not one of congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restrictions here complained of.[17]

Therefore, the Court sought to determine what joint power Congress and the President possessed in this field. If, as Professor Rossiter has suggested, the standard to be used is the cooperative nature of the exercise of power,[18] then such a criterion constitutes at best a minimum guarantee against encroachment of civil liberties in wartime, and at worst it opens the way for total negation of individual freedom during hostilities. Joint legislative-executive action combined with military necessity afforded the Court a position on which to stand. "The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage."[19] The judgment of military needs was to be accorded proper respect by the court. "Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions."[20] Apparently judicial intervention would

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[17] Ibid., p. 92.

[18] Clinton Rossiter, The Supreme Court and the Commander in Chief (Ithaca, Cornell University Press, 1951), p. 47.

[19] Hirabayashi v. United States, 320 U.S. 81, 95 (1942).

[20] Ibid., p. 98.

be countenanced only if the political branches acted in an irresponsible manner. There were no dissents, but three justices, in concurring, elaborated on points they felt had received insufficient consideration in the Court's opinion. On the question of the scope of judicial review of military measures Justice Douglas unequivocally stated: "The point is that we cannot sit in judgment on the military requirements of that hour, where the orders under the present act, have some relation to "protection against espionage and against sabotage."[21] Justices Murphy and Rutledge, while conceding the necessity of the curfew orders, thought there should be a clearer affirmation of protection against encroachments on individual liberty and the authority of the Court to review military orders. The tenor of the opinions indicated that both justices concurred with misgivings. Murphy devoted a large part of his opinion to a plea that individual liberties not be discarded during wartime. Justice Rutledge was disturbed by the implications of the decision for judicial review.

> I concur in the Court's opinion except for the suggestion, if that be intended (as to which, I make no assertion) that the Courts have no power to review any action a military officer may "in his discretion" find it necessary to take with respect to civilian citizens in military areas or zones.[22]

In upholding the constitutionality of the curfew orders the Court

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[21] Ibid., p. 106.

[22] Ibid., p. 114.

avoided a determination of the validity of exclusion. A year later in Korematu v. United States[23] a Japanese-American citizen convicted of violating an exclusion order sought to have the entire process of exclusion and evacuation declared unconstitutional. The unanimity that had been achieved in Hirabayashi collapsed, and the Court divided 6-3 in sustaining the exclusion process. Justice Black spoke for the majority. Again the Court invoked military considerations. "Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either (curfew and exclusion)."[24] The majority admitted that exclusion constituted a greater curtailment of individual freedom than curfew orders, but the weight of military opinion concerning the necessity of exclusion was accepted and the Court acquiesced in that assessment. But the case also required the disposition of the petitioner's allegation that exclusion and detention be considered as inseparable. Black declined to view the process in this manner. He argued that "since the petitioner has not been convicted of failing to report to or remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order."[25] Furthermore, the Court denied that racial bias was the reason for instituting the exclusion order. As Black phrased it,

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[23] 323 U.S. 214 (1944).

[24] Ibid., p. 218.

[25] Ibid., p. 222.

"to cast this case into outlines of racial prejudice without reference to the real military dangers which were presented merely confuses the issue."[26] Justice Frankfurter concurred, emphasizing that the judiciary must concern itself only with the constitutionality of the action here involved and not with its wisdom.

The three dissenters assailed the majority opinion on several grounds. Justice Roberts viewed the exclusion program as nothing more than "a part of an over-all plan for forceable detention."[27] Justice Murphy concentrated on the issue of racial prejudice. The jurist dramatically announced that the present case "goes over the very brink of constitutional power and falls into the ugly abyss of racism."[28] Finally, Justice Jackson contended that the fact that a military order might be reasonable did not necessarily make it constitutional or preclude judicial review. Otherwise, Jackson remarked, "we may as well say that any military order will be constitutional and have done with it."[29]

In Ex parte Mitsuye Endo[30] the Supreme Court reviewed the detention of citizens subject to exclusion and evacuation. The petitioner, an American citizen of Japanese descent, was evacuated and

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[26] Ibid., p. 223.

[27] Ibid., p. 232.

[28] Ibid., p. 233.

[29] Ibid., p. 245.

[30] 323 U.S. 283 (1944).

held in a detention center. She brought proceedings in district court for a writ of habeas corpus. Endo claimed that as a loyal American citizen, a concession the government made, she was entitled to immediate release. The writ was denied, and the Court of Appeals, on review, certified questions to the Supreme Court, and the latter ordered the entire record sent up for review.

Justice Douglas spoke for a unanimous Court in denying the authority of the government to detain an admittedly loyal citizen. The government freely admitted its limitations in this respect, but stated that to be able to affect an orderly relocation, continued custody of the petitioner was necessary for the time being. The Court concluded that the petitioner was entitled to immediate release. However, on the question of the constitutionality of detention in general the Court was evasive:

> In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude, that whatever power the war Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.[31]

The Act of March 21, 1942 did not mention detention, such procedures having been instituted by Executive Orders. Douglas argued that with respect to disloyal citizens "the power to detain is derived from the power to protect the war effort against espionage and sabotage,"[32]

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[31] Ibid., p. 297.

[32] Ibid., p. 302.

but "detention which has no relationship to that objective is unauthorized."[33] Because Endo fell within this latter category her detention was not permissible. While there were no dissenting opinions, Justices Roberts and Murphy concurred. Murphy was not content to rest on a statement that the detention was unauthorized. He also considered detention of citizens of whatever character to be unconstitutional.

Viewed from the perspective of 1960 the Japanese-American cases are in one sense of only historical significance. The Court was confronted with an unusual set of circumstances, the parallel of which had never before arisen in American history. Perhaps similar situations will never again arise. The judicial decisions of necessity must be considered in the context of the times. The nation was involved in an all-out war and unprecedented measures were demanded by the President And Congress. Calm and idspassionate judgment was extremely difficult. In another sense, however, the disposition of these cases is highly significant for an understanding of the role of the judiciary in time of war. The candid reliance on military necessity may be symptomatic of future judicial conduct in total war. There is reason to doubt whether the Supreme Court as an observer rather than as an active participant in national security policy can or should interpose its conception of what is reasonable or necessary for self-preservation. The fact that the Court chose to attempt the

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[33] Ibid.

reconciliation of these extreme measures with the Constitution did salvage judicial review of military measures, however acquiescent the majority turned out to be.

Espionage. The Japanese-American cases forcibly demonstrated the extent of governmental action to protect the nation against subversion. Nevertheless, it should be emphasized that these cases did not concern espionage, treason or the like. They were merely steps taken to safeguard against such eventualities. In the last two decades the Court has considered remarkably few incidents of overt disloyalty to the United States. The Espionage Act of 1917[34] initiated several prosecutions during World War I, and while that law remains on the statute books, very little use of it was made during the Second World War. In fact, only two cases reached the Court during the last war that involved alleged efforts to promote disloyalty and disobedience to regularly constituted authority. In Hartzel v. United States[35] the Court was asked to reverse a conviction based on the Espionage Act. Hartzel was an American citizen who was vociferous in his opposition to the war effort. Prior to American entrance into the hostilities he had written several articles that bitterly attacked Great Britain, the Jewish race, and the President of the United States. In 1942 three articles in the same vein were published. The pamphlets were circulated among various organizations

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[34] 40 Stat. 217 (1917).

[35] 322 U.S. 680 (1943).

including the United States Infantry Association. Two officers on duty read the article. Likewise employees of various organizations who were registered with the Selective Service System obtained copies. On this basis Hartzel was tried and convicted for violating the Espionage Act. In particular the provision used referred to persons who "wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States."[36] The Supreme Court on review laid down the following criteria for determining the sufficiency of the evidence upon which the conviction was based:

1. A specific intent or evil purpose at the time of the alleged overt act to cause insubordination or disloyalty in the armed forces or to obstruct the recruitment and enlistment service.[37]

2. A clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent.[38]

A majority of the Court felt that neither of these factors were present and reversed the conviction. In Keegan v. United States[39] various members of the German-American Bund appealed a conviction of conspiracy "to counsel divers persons to evade, resist, and refuse

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[36] 40 Stat. 217, Section 3 (1917).

[37] Hartzel v. United States, 322 U.S. 680, 686 (1943).

[38] Ibid., p. 687.

[39] 325 U.S. 478 (1944).

service in the land and naval forces of the United States."[40] The Bund, an organization designed "to keep alive the German blood in the United States,"[41] had protested strongly against a Congressional enactment, the substance of which was to deny positions in business and industry to members of the Bund and to Communists when vacancies occurred.[42] The Bund asserted that if they were denied the right to work, they should not be required to serve in the armed forces. Consequently, leaders of the Bund urged members to evade the draft whenever possible. A majority of the Court believed that the evidence was inadequate to conclude that a conspiracy had existed and that the Bund had not openly counseled "resistance to military service or evasion of military service."[43] Four members of the Court thought otherwise:

> The conclusion seems inescapable that petitioners by counseling Bund members to refuse to do military duty, counselled evasion of military service and that the jury's verdict of violation of Section 11 is therefore sustained by the evidence.[44]

In the post-war period repeated investigations of Communist activities and charges of espionage passed without Court review.

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[41] Ibid., p. 482.

[42] 50 U.S.C. App. 308 (i).

[43] Keegan v. United States, 325 U.S. 478, 492 (1944).

[44] Ibid., p. 504.

Espionage had first become a major problem in World War I.[45] Probably the most celebrated espionage trial following the Second World War involved Julius and Ethel Rosenberg. They were accused of a conspiracy to commit espionage in violation of the Espionage Act of 1917. Their conviction was followed by the imposition of the death penalty. On seven occasions the Supreme Court declined to review the case.[46] A few days before they were to die the Rosenbergs obtained a stay of execution from Justice Douglas. This action came at the end of the Court's 1953 term. Whereupon, the United States Attorney General requested Chief Justice Vinson to convene the Court in a special session to vacate Douglas' stay. Vinson did so, and the full Court heard arguments. The contention which had been urged on Douglas as the basis for granting the stay was that the Atomic Energy Act of 1946[47] had superseded the Espionage Act of 1917, and that the district court was without power to impose the death sentence. Douglas was convinced that this argument warranted further consideration and accordingly he acted to postpone the execution. The full Court was not persuaded that a substantial justiciable question had been raised and vacated the stay.[48] Justices Black, Frankfurter, and Douglas

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[45] Rosemarie Serino, "Espionage Prosecutions in the United States," Catholic University Law Review, 4 (1953-54), 46.

[46] Ibid., p. 45.

[47] 60 Stat. 755 (1946).

[48] Rosenberg v. United States, 346 U.S. 273 (1953).

dissented. On the same day the sentence was carried out.

Treason. Treason is the only crime specifically defined in the Constitution,[49] and there have been relatively few such trials in American history. This fact is partly attributable to the rigorous requirements set forth in the Constitution for obtaining a conviction of treason, and partly due to the reliance on other forms of punishment.[50] Cramer v. United States[51] was the first of three treason convictions the judiciary reviewed in the post-war period. Cramer was a naturalized American. In June, 1942 in answer to a note asking him to come to Grand Central Station in New York, Cramer met an individual named Theil who was one of eight Nazi saboteurs sent to the United States for the purpose of sabotage. The two had been friends for several years, and although Cramer contended during his trial that he was unaware of the reasons for Theil's presence in the United States, he did admit that he suspected that it was for propaganda purposes. Cramer had several meetings with Theil. Following the latter's arrest Cramer was also taken into custody and subsequently tried and convicted of treason. The Supreme Court was obliged to

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[49] Article III, Section 3, Clause 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them aid and comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on confession in open Court.

[50] Carl B. Swisher, The Supreme Court in Modern Role (New York, New York University Press, 1958), p. 76.

[51] 325 U.S. 1 (1944).

ascertain the meaning of treason and the sufficiency of the evidence in this case. Justice Jackson, speaking for the majority, discussed at length the historical basis of treason. The majority noted that the conditions necessary to constitute treason were adhering to the enemy and rendering aid and comfort to the enemy. With respect to an overt act the Court declared: "The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy."[52] Furthermore: "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."[53] The Court did not believe that Cramer's meeting with Theil, observed by two agents of the Federal Bureau of Investigation, amounted to an overt act of treason. In the absence of evidence that Cramer had materially aided the saboteurs, the overt acts were not treasonable in character. Justices Douglas, Black, Reed, and Chief Justice Stone dissented.

> The Court does not purport to set aside the conviction for lack of sufficient evidence of traitorious intent. It frees Cramer from this treason charge solely on the ground that the overt acts charged are insufficient under the constitutional requirement.[54]

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[52] Ibid., p. 34.

[53] Ibid., p. 35.

[54] Ibid., p. 57.

Also the minority took issue with the statement of the majority that required two witnesses to "related acts and events which show the true character of the overt act."[55] To accept this interpretation would, the dissident justices argued, unnecessarily obstruct future convictions in treason cases. The dissenters contended: "Since two witnesses proved that the meetings took place, their character and significance might be proved by any competent evidence."[56]

A second treason conviction arising from alleged aid to enemy saboteurs reached the Court in 1947.[57] In this case Hans Max Haupt, the father of one of the eight Nazis saboteurs, was convicted of treason because of the aid he furnished his son in harboring him in his home, and in aiding him in procuring a job and an automobile. With only Justice Murphy dissenting, the Court sustained the conviction. The argument that the acts complained of reflected natural parental assistance rather than treasonable intent failed to impress the Court. Kawakita v. United States,[58] the last of the trio of treason cases to merit the attention of the Court, was decided in 1951. Kawakita was an American citizen of Japanese ancestry. During the war he resided in Japan and obtained employment with a private firm occupied in mining lead for the Japanese war effort. In this

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[55] Ibid., p. 60.

[56] Ibid., p. 63.

[57] Haupt v. United States, 330 U.S. 631 (1946).

[58] 343 U.S. 717 (1951).

capacity he was guilty of mistreating American prisoners of war. Upon his return to this country he was tried for treason. Kawakita argued unsuccessfully that he had surrendered his American citizenship and hence could not be tried for treason. The Court declared that he was still an American citizen and that the evidence was sufficient to support his conviction. According to Professor Swisher:

> The Court seemed to be saying that a man could not play cat-and-mouse with his American citizenship, dropping it when it seemed unattractive, picking it up again for return to the United States, and again discarding it when it became a basis for a prosecution for treason.[59]

The Smith Act. Following the victory over the Axis powers in 1945 a new manace to American security materialized. The "cold war" fostered anxiety over the danger of Communism. In particular there was a growing belief that Communist elements in this country were laying the foundation for the overthrow of the American government by force and violence. The threat may not have been immediate, but it was grave enough to warrant concern in several quarters and to suggest the necessity of remedial action. The government turned to the Alien Registration Act of 1940,[60] better known as the Smith Act, as a weapon for attacking the Communist conspiracy. This Act was the first peacetime sedition law enacted since the ill-fated Alien and Sedition Acts in 1798.[61] The relevant portions of the Smith Act that were

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[59] Swisher, p. 75.

[60] 54 Stat. 670 (1940).

[61] 1 Stat. 596 (1798).

applied with increasing frequency in the late 1940's are noted in the margin.[62] Between 1940 and 1948 the Smith Act was invoked to indict and convict over one hundred Communist leaders.[63] As early as 1943 the Supreme Court refused to rule on the constitutionality of this controversial piece of legislation.[64] In 1948 the government prosecuted eleven top Communist leaders for conspiring to teach and advocate the violent overthrow of the United States Government. In one of the longest and most acrimonious trials in American history the

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[62]Sec. 2(a) It shall be unlawful for any person--(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with the intent to cause the overthorw or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. (b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the Government of any state, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them. Sec. 3, It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

[63]Harold W. Chase, "The Libertarian Case for Making It a Crime to Be a Communist," Temple Law Quarterly, 29 (1956), 128.

[64]Dunne v. United States, 138 F 2nd 137 (8th Cir. 1943), cert. denied, 320 U.S. 790 (1943).

Communists were found guilty and their conviction was affirmed by the Court of Appeals. The principal argument advanced by counsel for the Communists was that the Smith Act violated freedom of speech as guaranteed by the First Amendment. The Supreme Court agreed to hear the case but its grant of certiorari was limited to two questions: (1) the constitutionality of the Smith Act inherently or as construed and applied in the instant case in light of the First Amendment, and (2) the constitutionality of the Smith Act measured by the standard of indefiniteness. On June 4, 1951 the Court rendered its decision.[65] Five opinions were penned. Chief Justice Vinson delivered the opinion of the Court, in which Justices Reed, Burton, and Minton joined. Separate concurrences were written by Justice Frankfurter and Justice Jackson. There were two dissents by Justice Black and Justice Douglas. Justice Clark did not participate. These five opinions ranged broadly over such issues as freedom of speech, the clear and present danger test, reasonableness, conspiracy and a multiple of other issues. As Professor Swisher has noted, "One of the few things that can be said with certainty about the decision is that six justices voted to sustain the conviction, two dissented, and one did not participate."[66]

At the outset the Chief Justice dismissed any doubts that Congress might take appropriate measures to safeguard the nation. Freedom of

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[65] Dennis v. United States, 341 U.S. 494 (1950).

[66] Swisher, p. 81.

speech is to be accorded a high place in American constitutional values but it is not an absolute right.

> Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the consideration which gave birth to the nomenclature.[67]

As the privilege of freedom of speech is relative its limitation is admissible when the danger is grave enough to justify protection of society. Vinson paid lip service to Holmes' "clear and present danger" test, but he quoted with approval Judge Learned Hand's modified version of the standard that had been adopted by the Court of Appeals for this particular case. "In each case [courts] must ask whether the gravity of the evil discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[68] Justice Frankfurter wrote a lengthy concurrence. The jurist rejected the "clear and present danger" test in favor of a weighing of the interests involved. He announced, "Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to Congress."[69] Consequently, the

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[67] Dennis v. United States, 341 U.S. 494, 508 (1950).

[68] Ibid., p. 510.

[69] Ibid., p. 525.

Court should intervene only if Congress's judgment was unreasonable, and insofar as this case was concerned the justice continued "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security."[70] Justice Jackson felt that reliance on clear and present danger in this set of circumstances was misplaced. The test should be preserved for street corner speeches and the like, but was inappropriate for a well-organized conspiracy. Additionally, Jackson rested his concurrence on the argument that the petitioners had been convicted of conspiracy, and certainly Congress had ample power to prescribe punishment for such acts. He drew an analogy between conspiracy in anti-trust suits and the type involved here. Justice Black's dissent was short but emphatic. Professor David Fellman has characterized Black's dissent as "written more in sadness than in anger."[71] The justice stated he would discard the Smith Act as "a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids."[72] Douglas also dissented. Bassically, he argued that there was no clear and present danger. He described American Communists as "miserable merchants of unwanted ideas"[73] whose doctrines represented no immediate threat to America's

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[70] Ibid., p. 542.

[71] David Fellman, "Constitutional Law in 1950-51," American Political Science Review, 46 (1952), 164.

[72] Dennis v. United States, 341 U.S. 494, 579 (1950).

[73] Ibid., p. 589.

security.

The Dennis decision, by any standard, is one of the most significant rulings to issue from the Court in recent years. It clearly and unequivocally affirmed the power of the national government to legislate in the field of subversion, First Amendment freedoms to the contrary notwithstanding. The Chief Justice's opinion in effect established a new test for determining the occasions when speech might be curtailed, "the gravity of the evil discounted by its improbability." Thus as one commentator observed, "the rule of clear and present danger was redefined as the rule of clear and probable danger."[74] Despite the inability of the Court to arrive at a consensus in its reasoning, there was little to justify optimism for libertarians. The victor in the Dennis decision was obviously the Congress. The self-restraint of the Court could easily be taken as an acknowledgment of the conspiratorial nature of international Communism and of the fact that the Communist Party would be treated as an undemocratic movement. For this reason Communists could expect little judicial protection so long as the Supreme Court regarded its aims as outside the pale of traditional protections.[75]

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[74] Claudius O. Johnson, "The Status of Freedom of Expression under the Smith Act," Western Political Quarterly, 11 (1958), 473.

[75] Several miscellaneous rulings concerning the Smith Act have been issued by the Court. Stack v. Boyle, 342 U.S. 1 (1951). Persons accused of violating the Smith Act are entitled to bail. Green v. United States, 356 U.S. 165 (1957). The Court sustained the conviction of petitioners for criminal contempt after they failed to surrender subsequent to a Smith Act conviction. Sacher v. United States, 343 U.S. 1 (1951); In Re Isserman, 345 U.S. 286 (1952); Isserman v.

Between 1951 and 1957 several changes in personnel occurred on the Court, the spectre of McCarthyism diminished, and generally a resurgance of libertarian values was evidenced in the United States. On June 17, 1957 the Supreme Court decided the case of Yates v. United States.[76] In reversing the conviction of fourteen Communists the Court to a large degree weakened the Smith Act. The petitioner had been convicted of conspiring to advocate and teach the violent overthrow of the United States government, and conspiring to organize the Communist Party for accomplishing the same ends. The decision was based on three major issues. First, the term "organize" as used in the Smith Act was strictly construed. Secondly, the Court asserted that advocacy meant advocacy of action and not advocacy as an abstract doctrine. Finally, the evidence upon which five of the fourteen were convicted was so meager that the Court took the unusual step and ordered their acquittal. The other nine could be retried because there was adequate evidence to justify another trial.

The word "organize" had not been defined by the Smith Act. As the Communist Party was organized in 1945 and this prosecution was commenced in 1951 it would be barred by the statute of limitations if organizing referred only to the initial act of establishment. Justice

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Ethics Committee, 345 U.S. 927 (1953); Sacher v. Association of the Bar of City of New York, 347 U.S. 388 (1953); In Re Sawyer, 360 U.S. 622 (1958). These cases concerned discipline that was taken against attorneys who were connected with Smith Act prosecutions.

[76] 354 U.S. 298 (1956).

Harlan contended, "the word refers only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities; even though such acts may loosely be termed 'organizational'".[77] On the question of advocacy the Court carefully distinguished Yates from Dennis. Judge Medina's instructions to the jury in the Dennis trial had differentiated between the two types of advocacy, and the Court had approved a conviction based on advocacy of action.[78] In the instant case the judiciary found the trial judge's instructions defective because of his failure to distinguish "between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end."[79] Harlan observed:

> We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.[80]

Thus, it is immaterial what the motives of the speaker is, so long as

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[77] Ibid., p. 310.

[78] Louis B. Boudin, "'Seditious Doctrine' and the 'Clear and Present Danger' Rule," Virginia Law Review, 38 (1952), 325. The relevant portions of Judge Medina's charge to the jury are as follows: "I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action."

[79] Yates v. United States, 354 U.S. 298, 320 (1956).

[80] Ibid., p. 318.

his speech is couched in terms of abstract doctrine. When, on the other hand, speech is clearly designed to encourage and incite action, the purpose of which is violent overthrow of the government, the Smith Act has been violated and the speaker may be prosecuted. Having established this interpretation, Harlan held for the Court that five of the petitioners should be acquitted because the evidence established nothing more than abstract advocacy. Moreover, mere membership in the Communist Party did not provide sufficient evidence of an intent to urge the overthrow of the government. As for the other petitioners, there was enough evidence for a finding of advocacy of action and the Court stated they could be retried consistent with the standards established in the present case. Justice Burton concurred except as to the meaning of "organize" adopted by the Court. Justices Brennan and Whittaker took no part in the case. Justices Black and Douglas agreed with the findings of their brethren of the majority. They would go farther in protecting freedom of speech, and permit advocacy of any doctrine "whether or not such discussion incites to action, legal or illegal."[81] Justice Clark disagreed with the majority on all points and would affirm the convictions. The Yates decision unquestionably marks the beginning of a more restrictive interpretation of the Smith Act. Future convictions under the organizing clause are precluded unless Congress chooses by legislation to avoid this part of the Court's decision. Prosecutions can still

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[81] Ibid., p. 340.

be maintained for advocacy provided such advocacy incites action rather than abstract discussion. Doubtless the evidence needed to produce a verdict of guilty on this basis will have to be substantial. Perhaps too much can be made of the Court's decision. It does not rule out further reliance on the Smith Act. Simply stated, it imposes a greater evidentiary burden on the government to maintain a prosecution and requires that the trial judge be explicit in his instructions as to the type of advocacy that is foreclosed by the Smith Act. Nevertheless, the government may find that the Smith Act is no longer the most effective device to employ in attacking the Communist conspiracy. As a result of this case propaganda activities unrelated to an incitement to violence enjoy judicial protection, however disagreeable they may be; further, the Supreme Court, given its present attitude and the current state of world conditions, seems unprepared to extend the Smith Act beyond a limited interpretation.

State Subversion Legislation. The states as well as the Federal government have been concerned with the question of subversion. Most states have passed laws comparable to the Smith Act.[82] In fact, the Smith Act itself was patterned after the first state subversion statute, the New York Criminal Anarchy Act of 1902.[83] These laws vary in content from state to state, but in essence they proscribe

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[82] Walter Gellhorn, ed., The States and Subversion (Ithaca, Cornell University Press, 1952).

[83] Dennis v. United States, 341 U.S. 494, 562 (1950).

activity and speech that seek to encourage, teach, or abet violent overthrow of the state or federal government.[84] State subversion legislation has remained largely undisturbed by the courts in the past two decades. In 1943 the Supreme Court did invalidate a Mississippi statute that made it a crime to encourage the refusal to salute the flag.[85] A unanimous Court saw no intent to commit subversive activity in the innocuous comments of the appellants; nor did their activities constitute a clear and present danger. In 1953 the Court refused to rule on the constitutionality of the Michigan Communist Control Act until State Courts had construed the statute.[86]

Steve Nelson, a Communist leader, was convicted of violating the Pennsylvania Sedition Act and was sentenced to twenty years in prison. The State Supreme Court reversed the conviction, contending that the state statute had been superseded by the Smith Act. The United States Supreme Court by a vote of 6-3 affirmed the Pennsylvania Court's holding.[87] Chief Justice Warren maintained that the Smith Act had pre-empted the field of subversion legislation and, accordingly, the state law must fall. Pre-emption is not a novel doctrine in American constitutional law, but it has usually been applied in

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[84] Gellhorn, p. 359.

[85] Taylor v. Mississippi, 319 U.S. 583 (1942).

[86] Albertson v. Millard, 345 U.S. 242 (1952).

[87] Pennsylvania v. Nelson, 350 U.S. 497 (1955).

commerce cases.[88] The majority opinion reviewed the various federal laws dealing with subversion, and Warren stated, "taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it."[89] Moreover:

> Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal government precludes state intervention, and that administration of state acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable.[90]

Justices Reed, Burton, and Minton argued in dissent that there was no evidence that Congress had intended to bar state laws merely because they were concerned with the same subject-matter. It seems more likely that Congress had not even considered this question; therefore, the search for Congressional intent becomes largely a matter of seeking justification for a pre-determined position. The majority displayed a distaste for state subversion laws because of the belief that justice could better be secured by federal legislation.[91] Therefore,

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[88] Cloverleaf Butter Company v. Patterson, 315 U.S. 148 (1942); Hill v. Florida, 325 U.S. 538 (1945); California v. Zook, 336 U.S. 725 (1949).

[89] Pennsylvania v. Nelson, 350 U.S. 497, 504 (1955).

[90] Ibid., p. 509.

[91] Ibid., p. 508. Chief Justice Warren had these comments about state subversion laws. He called them "vague and . . . almost wholly without . . . safeguards. Some even purport to punish mere membership in subversive organizations which the federal statutes do not punish where federal registration requirements have been fulfilled."

in the absence of conclusive evidence about Congressional intent, the opinion of the Court reads as a judicial subjective judgment rather than as an expression of Congressional will.[92] It is customary to point out that Congress can clarify its intentions when the Supreme Court has misconstrued its purpose. While certainly true, such a position often overlooks the complexities of the legislative process. In any event Congress has taken no action to change the Court's decision in the four years that have passed since the Nelson case was decided.

Government Files and the Problem of Secrecy. A problem that sometimes arises in Court proceedings is the question of how far the government must go in opening its files for examination by defendants or parties to a suit against the government. Information of a classified nature that is vital to the national security is cautiously guarded lest it fall into the hands of persons who might use it to the prejudice of this country.[93] Often the government is reluctant to permit examination of its files even when the information contained does not bear directly on the national security. Lack of access to such records may frustrate defendants in criminal prosecutions as it makes impeachment of government witnesses more difficult. The

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[92]Roger C.Cramton, "Pennsylvania v. Nelson: A Case Study in Federal Pre-Emption," University of Chicago Law Review, 26 (1958-59), 107. Compare, Alan Reeve Hunt, "State Control of Sedition: The Smith Act as the Supreme Law of the Land," Minnesota Law Review, 41 (1956-57.

[93]United States v. Reynolds, 345 U.S. 1(1952).

competing interests have to be resolved with maximum protection for both the government and the individual. Probably the most notable and controversial decision of the Supreme Court on this subject was rendered in 1957 in Jencks v. United States.[94] The petitioner had been convicted of swearing falsely when he executed a non-Communist oath as required of labor union officials by the Taft-Hartley Act.[95] At the trial defense counsel requested the production of certain government files. These files contained statements by informers prejudicial to Jencks. The request was denied. These same informants testified against Jencks in the present trial. The petitioner contended before the Supreme Court that the trial judge had erred. The reports should have been made available for use by the defense in cross-examination of witnesses, who had submitted the reports. With only Justice Clark dissenting, the Court ruled that the records should have been made available. Justice Brennan remarked:

> We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written, and when orally made, as recorded by the FBI, touching the events and activities to which they testified at the trial.[96]

Moreover, the Court stated that the defense had a right to inspect the

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[94] 353 U.S. 657 (1956).

[95] 61 Stat. 136 (1947).

[96] Jencks v. United States, 353 U.S. 657, 668 (1956).

reports. Brennan noted his disapproval of the practice of producing the documents for the judge to examine and to determine their relevancy without letting the accused be heard. Justice Burton and Harlan saw no infirmity in this practice. Clark's dissent painted a foreboding picture of the effect of the Court's holding:

> Unless the Congress changes the rule announced by the Court today, those intellegence agencies of our government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.[97]

Clark doubtless overstated the impact of the Jencks decision, but unquestionably if the rule here announced remained unaltered, the government would find itself confronted with the alternatives of public disclosure of confidential information or cancelling prosecutions to keep its files intact. But in no realistic sense can it be said that the Court's decision sanctioned indiscriminate "rummaging" through confidential files. An immediate outcry resulted in many quarters against the decision. Congressional reaction culminated in the passage of legislation designed to diminish the potential damage from the Court's decision. The so-called Jencks Act[98] did not expressly overturn the Court's ruling, but it did establish procedures for the purpose of safeguarding government files. In essence the Act

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[97] Ibid., p. 682.

[98] 71 Stat. 595 (1957).

provided that no statement or report in the possession of the government containing information provided by witnesses would be subject to subpoena, unless that same witness testified by direct examination in a criminal prosecution. In that event the trial judge would be permitted to examine the reports in camera and excise the material relevant to the particular circumstances and deliver such information to the defendant. Should the defendant be found guilty, all records would be preserved for examination by the Court of Appeals to determine whether the trial judge had ruled correctly. In recent cases the Supreme Court, while not ruling on the validity of the law, has decided that information might be withheld by the government if it does not fall within the meaning of "statement" as used in the Jencks Act.[99] Similarly, if the failure to produce a paper constitutes no more than a harmless error, the Jencks Act is not violated.[100] It is not improbable that the Court will find occasion in the future to examine the Act on its merits.

Summary. The fear of subversion has fostered widespread governmental vigilance in the past two decades. The disparate disputes that have arisen have engendered controversy and constitutional interpretation in many forms. The nine justices on the Supreme Court have been forced to adjudicate issues the import of which encompassed

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[99] Palermo v. United States, 360 U.S. 343 (1958).

[100] Rosenberg v. United States, 360 U.S. 367 (1958).

delicate questions of national security and individual freedom. As is so often pointed out, hard cases often make bad law, and they frequently make confusing law. Especially is this fact the case in the unsettled environment that has characterized the "cold war." Settled precedents cannot be invoked with the same assurance that the Court uses in its disposition of less controversial issues. Yet, controversy has always been and will continue to be an inevitable ingredient of the judicial process so long as the Supreme Court functions as the interpreter of the Constitution.

Chief Justice Vinson remarked in the Dennis case that there are no absolutes, everything is relative.[101] Judicially, this axiom has been the salvation of a perplexed and uncertain court. As a standard of rationalization it conveniently discards both the concept of an all-powerful and a powerless government. It embraces the essentially undemocratic feature of extreme wartime controls, and provides for the assertion of libertarian activism in periods of tranquility. It permits discretionary power and yet invites judicial checks for the unreasonable and arbitrary exercise of power. In short, constitutional relativism by its very nature may be all things to all men, but to the Supreme Court it is apparently the best solution available to the paradox of security and freedom.

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[101] Dennis v. United States, 341 U.S. 494, 508 (1950). The Chief Justice remarked, "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature."

One of the interesting features of Court performance in subversion cases is that the black-robed justices have been compelled to descend from the plateau of disinterested objectivity to the mundane but necessary appraisal of practical events. Accordingly, when the President and Congress took the unprecedented action of evacuating thousands of Japanese-American citizens the Supreme Court with unusual candor regarded these steps as a military necessity and hence outside the pale of judicial intervention. Treason and espionage cases were more amenable to an unbiased evaluation of evidentiary standards. Yet a determination of the constitutionality of the Smith Act necessitated a balancing of freedom of speech against the need for protection of American security. State subversion legislation was measured by standards of desirability as viewed by the Court and found wanting.

There is no reason to believe that the Court has surrendered its function of dispensing justice, but the record of constitutional law in the last twenty years demonstrates the difficulty of obtaining abstract justice. Subversion is a present danger and the Court no less than the political branches has been forced to accommodate the Constitution to practical dangers. The Supreme Court may or may not follow the election returns, but there is justification for asserting that they are cognizant of the fluctuations in the ideological struggle between democracy and the forces of totalitarianism.

CHAPTER VII

THE MILITARY

If there is any principle that is firmly entrenched in American constitutional doctrine it is that the military is subordinate to civil authority. The framers of the Constitution were cognizant of the dangers of unbridled military power, and sought to insure that the military arm of the government would not become the instrument of tyranny. Happily, military-civil relationships in this country have been maintained with a minimum of friction for the most part. Nevertheless, the traditional distrust of military authority has not altogether dissipated, and the appropriate balance between civil and military spheres requires frequent determination by the Supreme Court. The relationship of that august tribunal to military authority presents delicate and at times difficult adjustments that necessitates marked judicial wisdom and ingenuity. On the one hand, the Court is confronted with a separate system of jurisprudence founded on clearly articulated constitutional provisions. Persons amenable to military law are not stripped of judicial protection, but the standards for discipline and punishment are oftentimes rigorous, and not infrequently abrupt and decisive. Yet the soldier, sailor, and airman is an American citizen and not outside the pale of any civil protection simply because he dons the uniform of his country. The preservation

of civil authority consistent with military needs, and the interpretation of the bounds of military power, are not recent problems; they are grounded in extensive judicial precedent.

So long as the armed services of the United States comprised only a small core of professionally trained men, the reach of military law was not great, and its effect on American life went largely unnoticed. But today the professional soldier has, for the most part, been replaced by the civilian who is assimilated into the military by conscription. The "citizen soldier" has carried the brunt of battle against the enemy in the last two world wars. The rapid expansion of American military installations throughout the world and the increase in the number of civilians accompanying servicemen overseas has created manifold problems of jurisdiction. Therefore, an understanding of the Supreme Court's role vis-a-vis military law and jurisdiction is an essential component of the judiciary's reaction to the turbulent events that have moulded national security policy in the last twenty years. An initial area of inquiry is judicial treatment of selective service cases.

Selective Service. As early as 1863 the United States Government resorted to conscription as a means of raising an army.[1] Again in World War I the draft was the chief method by which the needs of the military were fulfilled.[2] In 1940, with war clouds forming on the

[1]Carl B. Swisher, American Constitutional Development (2nd ed., Boston, Houghton Mifflin Company, 1954), p. 293.

[2]Selective Service Act of 1917, 40 Stat. 76 (1917).

horizon, Congress enacted the nation's first peacetime compulsory military draft.[3] The act provided for the registration of all men between the ages of eighteen and thirty-five. The measure further provided that the administration of the program be carried out by local draft boards. They would be charged with the responsibility of classification and the issuance of calls to service to qualified citizens. A process of administrative review was established to insure standards of fairness and non-discrimination. Congress spelled out broad categories of exemptions from military service and permitted deferments under specified circumstances. In all instances the classification was determined first by the local board and then subject to review by the appropriate agencies. These decisions were declared to be final.

The finality of selective service rulings would seem to preclude judicial review. Thus, at the outset, questions arose as to the type of review, if any, the Court could exercise, and if review existed, what was its scope? In Falbo v. United States[4] the Supreme Court directly confronted the issue of judicial review of draft classifications. Falbo had been ordered to report for induction into the armed services. He claimed that the board had incorrectly classified him by not allowing his exemption as a minister, and he refused to submit to induction. In the criminal prosecution that ensued, the

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[3]Selective Training and Service Act, 54 Stat. 885 (1940).

[4]320 U.S. 549 (1943).

district court refused to permit the introduction of evidence concerning the "propriety" of the local board's classification. The Supreme Court refused to intervene because the administrative procedure had not been exhausted. The termination of that process came with actual induction into one of the branches of service.[5] Justice Black observed for the majority: "Surely if Congress had intended to authorize interference with that process by intermediate challenges of order to report, it would have so so."[6] Correspondingly, in criminal prosecutions for violation of induction orders, the propriety of the classification was not subject to review. The Falbo decision did not expressly deny the right of judicial review; it simply required the individual to follow the steps in the prescribed procedure including induction. Still to be resolved was the review that would be available in the event that administrative remedies were exhausted. Such a question arose in Estep v. United States.[7] Here the petitioner refused to report for induction after his local board refused to classify him as a minister. In the ensuing criminal prosecution the district court, adhering to the Falbo ruling, refused to entertain evidence concerning the validity of Estep's classification. Estep argued not only that his classification was erroneous, but that the

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[5] Billings v. Truesdell, 321 U.S. 542 (1943). The Court held that a registrant was not actually inducted until he underwent the prescribed induction ceremony including taking the oath.

[6] Falbo v. United States, 320 U.S. 549, 554 (1943).

[7] 327 U.S. 114 (1945).

draft board had incorrectly withheld certain documents from the file sent to the appeal board. The Supreme Court, in a 7-2 decision, asserted that this failure to comply with established procedure vitiated the proceedings.

> We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by the local boards, no matter how flagrantly they violated the rules and regulations that define their jurisdiction.[8]

The Court was unpersuaded that a person could be sent to jail for disobeying an illegal order of an administrative agency and have no recourse to the courts for relief. An equally crucial holding in Estep concerned the review of evidence upon which a classification was based. Black phrased it in this manner: "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."[9] Thus, in effect, Estep foreshadowed the beginning of a new direction of judicial review for draft classifications. The Court committed itself to a careful scrutiny of selective service procedures in order to ascertain whether local boards complied with the law and followed due process as provided by law or whether practices engaged in impaired

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[8] Ibid., p. 121.

[9] Ibid., p. 123.

the jurisdiction of Selective Service agencies.[10] Due process seems to dictate at the least that a registrant be given the right of judicial review at some stage of the process.[11]

The basis-in-fact doctrine enunciated in the Estep case expanded judicial review and in essence confirmed the contention that decisions of selective service agencies were not final. On a case-by-case approach the Court proceeded to examine classifications to determine whether there was a basis in fact for the ruling of selective service agencies.[12] This increased scope of judicial review of local boards' classifications was a reversal of the trend evinced in Falbo It can perhaps be explained partially by the transition from war to more tranquil times. There is another factor that cannot be ascertained with any degree of certainty. The majority of cases reaching the high court concerning Selective Service developed from circumstances where registrants challenged their classifications and military obligations on religious grounds; most of them pertained to the religious sect known as Jehovah's Witnesses. The Supreme Court has demonstrated a

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[10] See: Eagles v. Samuels, 329 U.S. 304 (1946); Eagles v. Horowitz, 329 U.S. 317 (1946); Gibson v. United States, 329 U.S. 338 (1946); United States v. Nugent, 346 U.S. 1 (1952); Simmons v. United States, 348 U.S. 397 (1954); Gonzales v. United States, 348 U.S. 407 (1954); Bates v. United States, 348 U.S. 966 (1951).

[11] Theodore Jefferson, "Judicial Review of Draft Board Orders," Wyoming Law Journal, 10 (1955-56), 214.

[12] Cox v. United States, 332 U.S. 442 (1947); Dickinson v. United States, 346 U.S. 389 (1953); Witmer v. United States, 348 U.S. 375 (1954); Sicurella v. United States, 348 U.S. 385 (1954).

remarkable affinity for minority groups and their protection, and this same attitude may have been extended to the present cases. The consequence has been that in recent years the Court has sometimes taken on the complexion of a super draft board by insisting that individuals not be capriciously denied legitimate classifications. If legislative displeasure has been incurred there is no evidence to support such a view, for Congress has not shown any disposition to reverse the role presently assumed by the Court.

The judiciary has resolved various other controversies arising out of the Selective Service program, all relatively minor in importance. The Court has ruled that the venue for offenses involving the failure to accept induction[13] and failure to do civilian work[14] is properly laid in the district where such violations occurred and not in the district where the local draft board is located. Two lower court judgments were set aside by the Supreme Court because of inadequate evidence to support charges that the petitioners had knowingly failed to keep their draft board informed of their addresses.[15] The Court has maintained that an overt act is not necessary to establish conspiracy to aid in the evasion of military service.[16] Habeas corups relief cannot be sought when petitioners failed to appeal

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[13] United States v. Anderson, 328 U.S. 699 (1945).

[14] Johnston v. United States, 351 U.S. 215 (1955).

[15] Bartchy v. United States, 319 U.S. 484 (1942); Ward v. United States, 344 U.S. 924 (1952).

[16] Singer v. United States, 323 U.S. 338 (1944).

adverse lower court decisions.[17] Selective Service regulations do not impose legal obligations on an employer to keep the draft board abreast of information which affects the status of an employee registrant.[18]

Separation from military service by discharge is ordinarily accomplished without benefit of judicial review. In 1953 the Court refused to order a physician discharged because he had not been granted a commission.[19] A divided Court concluded that while doctors must by law be assigned duties related to their training, there is no obligation that a commission be granted. More recently the Court held that the Secretary of the Army had exceeded his statutory authority in granting less than an honorable discharge based on information that related to preinduction activities.[20]

Military conscription remains an integral part of American defense posture. The major issues surrounding selective service have been litigated, and there would seem to be no paramount problem that has not been disposed of by the courts. It is no longer open to question that draft boards are not the final spokesmen on matters of classification. Judicial review will be extended via habeas corpus proceedings after induction. Classifications may be assailed if there

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[17] Sunal v. Large, 332 U.S. 174 (1946).

[18] Mogall v. United States, 333 U.S. 424 (1947).

[19] Orloff v. Willoughby, 345 U.S. 183 (1952).

[20] Harmon v. Brucker, 355 U.S. 579 (1957).

is no basis in fact for the local board's ruling. Also, a classification based upon an erroneous interpretation of existing laws, or refusal to comply strictly with procedural safeguards, will result in court intervention. Short of these conditions the action of local boards and the administrative appeal agencies is final.

The Historical Background of Military Jurisdiction. Thousands who have passed the portals of civilian life and entered the ranks of the military have also become the subjects of military jurisdiction. The breach between civil and military has not been so great in this country as in other societies, but the accepted standards of law and justice have been formulated in a different atmosphere. Any lucid appraisal of the Supreme Court function and attitudes with regard to the military must be based on an understanding of the historical background of military and civil jurisdiction. Like so many other areas of judicial interpretation the slate is not clean. The judgments of military tribunals are not immune from civil review, and much of the controversy flows from an attempt to delineate the scope of military jurisdiction and its amenability to judicial checks.

The authority of military tribunals originates in general in the Constitution, the Congress, and the President. Some years ago a statement issued by the Government contained this observation:

> The sources of military jurisdiction include the Constitution and international law. The specific provision of the Constitution relating to military jurisdiction are found in the powers granted by

> Congress, in the authority vested in the President, and in a provision of the Fifth Amendment.[21]

The grants of power to Congress have reference to Article I, Section 8, Clauses 14, 15, and 16[22] specifically and generally to the other provisions of Section 8. The Presidential authorization lies mainly in the first clause of Article II which confers upon the President the position of Commander-in-Chief of the Army and Navy. The bifurcation of military and civil authority is evident from the aforementioned clause concerning Congressional power to prescribe regulations for military personnel and the other constitutional provisions. This grant of power is found among the enumerated powers of Congress, and is separate from the judicial power of Article III.[23]

As early as 1806 the Court placed legitimate acts of courts-martial beyond the review of civil courts.[24] The opinion of the Court in Dynes v. Hoover[25] was clear and unequivocal on the question of

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[21] Manual For Courts-Martial U.S. Army (1949), p. 1.

[22] To make Rules for the Government and Regulation of the land and naval Forces: To provide for calling forth the Militia to execute the Laws of the Union, supress Insurrections and repel invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the authority of training the militia according to the discipline prescribed by Congress.

[23] Dynes v. Hoover, 20 How. 65 (1857).

[24] Wise v. Withers, 3 Cranch 331 (1806).

[25] 20 How. 65 (1857).

Congressional power:

> Congress has the power to provide for the trial of military and naval offenses in the manner then and now practiced by civilized nations . . . the power to do so is given without any connection between it and 3rd Article of the Constitution defining the judicial power of the United States; indeed the two powers are entirely independent of each other.[26]

Therefore, Congress has the power to authorize the necessary procedures for maintaining discipline within the armed services of the United States,[27] and if a military tribunal is legally constituted and possesses jurisdiction pursuant to statutory requirements, matters of error are not subject to civil court review.[28] The Court has contended that the military is better equipped to deal with matters that fall within the jurisdiction of courts-martial.[29] The only remedy remaining in the hands of civil courts is the authority to grant writs of habeas corpus, but that remedy is available only if the military tribunal is without jurisdiction. Where jurisdiction is evident, the writ will not be issued as a means of setting aside judgments,[30] and the want of jurisdiction must be absolute to warrant reversal by civil

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[26] Ibid., p. 79.

[27] Collins v. McDonald, 258 U.S. 416 (1921); United States v. Grimley, 137 U.S. 147 (1890). The President can also authorize courts-martial. Swaim v. United States, 165 U.S. 553, 554 (1896).

[28] Mullan v. United States, 212 U.S. 556 (1908); McClaughry v. Deming, 186 U.S. 49 (1901).

[29] Smith v. Whitney, 116 U.S. 167 (1885).

[30] Johnson v. Sayre, 158 U.S. 109 (1894).

courts.[31]

The law governing military tribunals is found in a system of codified rules that have evolved from Revolutionary times.[32] Even before the Declaration of Independence the first Articles of War were promulgated in 1775 to govern troops in Massachusetts, and additional Articles were added in November of the same year.[33] By a Congressional enactment in 1806 other provisions were appended bringing the code to a total of 101 Articles.[34] Various modifications were accomplished during the next century and a half, but perhaps the most complete examination and overhaul came with the passage of the Uniform Code of Military Justice in 1950.[35] This code, comprising 140 provisions, constitutes the current rules and regulations that are applicable to the military.

The far-flung military operations of the United States during World War II and its aftermath made imperative an expansion of military authority well beyond the continental limits of the United States. Despite its reliance upon history, the Supreme Court became

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[31] Carter ex rel Carter v. McClaughry, 183 U.S. 365 (1901).

[32] William Winthrop, Military Law and Precedents (2nd ed., Washington, 1920), p. 21.

[33] William B. Aycock, Seymour W. Wurfel, Military Law under the Uniform Code of Military Justice (Chapel Hill, University of North Carolina Press, 1955), p. 9.

[34] Winthrop, p. 23.

[35] 64 Stat. 108 (1950).

the vehicle for arbitrating questions of conflicting jurisdiction, and the guardian of the constitutional rights of those who temporarily fell under military control. To deal with offenses falling within the pale of military jurisdiction various tribunals have from time to time been established. The most prevalent of these has been the court-martial. In this area, two broad categories of cases have occupied the attention of the Supreme Court. These grow out of the use of the courts-martial for military and civilian personnel. Examination of judicial decisions in each of these categories will be useful in ascertaining the view of the Court regarding the status of court-martial jurisdiction.

Courts-Martial. As emphasized earlier, the civil courts generally refrain from interfering with courts-martial unless that body should be without jurisdiction. Substantial errors in the conduct of a trial before a Court-martial could conceivably impair jurisdiction. However, the Supreme Court has been disinclined to broaden its review of military judgments. For example, the judiciary refused to nullify the validity of the jurisdiction of a second court-martial after the first trial had been interrupted because of the "tactical situation" on the battlefield.[36] Moreover, the denial of a full pre-trial investigation did not adversely affect court-martial jurisdiction and thereby expose it to attack by habeas corpus.[37] In Hiatt v. Brown[38]

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[36]Wade v. Hunter, 336 U.S. 684 (1948).

[37]Humphrey v. Smith, 336 U.S. 695 (1948).

[38]339 U.S. 103 (1949).

the high tribunal reasserted the limitations of civil court review in refusing to consider alleged errors by the appointing authority that had taken place in the conduct of a court-martial.

> The exercise of the discretion thus conferred on the appointing authority may be reviewed by the courts only if the gross abuse of that discretion would have given rise to a defect in the jurisdiction of the court-martial.[39]

This emphatic observation was made:

> It is well settled that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test is jurisdiction."[40]

The limited inquiry to establish jurisdiction precludes a review of irregularities that may have taken place, and "any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil court."[41] Neither has the Supreme Court shown any propensity to interfere with the authority of military review agencies to modify court-martial sentences,[42] or for that matter to assume this function for itself.[43]

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[39] Ibid., p. 109.

[40] Ibid., p. 108.

[41] Whelchel v. McDonald, 340 U.S. 122, 127 (1950).

[42] Jackson v. Taylor, 353 U.S. 569 (1956).

[43] Fowler v. Wilkinson, 353 U.S. 583 (1956).

The aforementioned cases reflect a limited role for civil courts vis-à-vis military courts-martial. Yet, none of these reach the fundamental issue of whether the constitutional guarantees of the Bill of Rights are applicable to military trials. Clearly the Fifth Amendment exempts the armed services from the grand jury indictment requirements and by implication the jury trial provision of the Sixth Amendment.[44] As for the other sections of the first ten amendments there is disagreement among students of constitutional law with respect to the intent of the framers.[45] In 1953 in Burns v. Wilson[46] the Court considered the question of whether the due process clause of the Fifth Amendment was a limitation upon the military. In the instant case the alleged errors were not held to be violative of due process, but there was disagreement as to the extent of protection afforded by due process. Chief Justice Vinson in an opinion joined in by Justices Reed, Burton, and Clark conceded that under certain circumstances due process might be invoked in military trials:

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[44]Robert D. Duke, Howard S. Vogel, "The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction," Vanderbilt Law Review, 13 (1960), 441.

[45]Gordon D. Henderson, "Courts-Martial and the Constitution: The Original Understanding," Harvard Law Review, 71 (1957), 293. The author contends that the framers of the Constitution intended for the Bill of Rights to apply to courts-martial. For a contrary view see, Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice I," Harvard Law Review, 72 (1958).

[46]346 U.S. 137 (1953).

> The constitutional guarantees of due process is meaningful enough and sufficiently adaptable to protect soldiers as well as civilians from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.[47]

Justice Minton, in concurring, reminded his colleagues: ". . . we have no supervisory power over the administration of military justice,"[48] and consequently he considered it mischievous to urge any expansion of judicial review. As for the due process argument the jurist countered: "Due process of law for military personnel is what Congress has provided for them in the military hierarchy in courts established according to law."[49] Justice Frankfurter was disturbed by the haste with which the Court had decided the case and urged re-argument. In the meantime he reserved his views. Justices Black and Douglas argued that all of the Fifth Amendment provisions were applicable to the military. Only Justice Minton was prepared to dismiss entirely the reliance on the due process clause as a limitation on courts-martial, but the other opinions, save for Black's and Douglas', are somewhat vague on this point. One commentator has evaluated the import of the decision in these words:

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[47] Ibid., p. 143.

[48] Ibid., p. 147.

[49] Ibid.

> Federal civil courts in habeas corpus may look only to determine whether a military petitioner has received full and fair considerations by the appellate tribunals of the military justice system.[50]

This contention, on its face at least, seems to suggest that civil courts while unlikely to intercede in military proceedings, will do so in the absence of some semblance of fairness. The Uniform Code of Military Justice has evoked both praise and criticism,[51] but so long as its provisions are subscribed to, the Court is unlikely to face the problem of gross injustice if the law is impartially applied.

The fact that military personnel are subject to court-martial jurisdiction and its summary procedures is no longer open to question. But the extension of this regulation to civilians closely connected with the armed services has elicited no small amount of disagreement and has posed perplexing constitutional as well as practical problems. In 1948 the Supreme Court ruled that a court-martial had no jurisdiction over an offense committed by a serviceman during a previous enlistment even though only a day passed between his honorable discharge and subsequent re-enlistment.[52] Congress attempted to

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[50] Aycock, Wurfel, p. 100.

[51] Mandeville Mullally, Jr., "Military Justice: The Uniform Code in Action," Columbia Law Review, 53 (1953); Bernard Landman, Jr., "One Year of the Uniform Code of Military Justice: A Report of Progress," Stanford Law Review, 4 (1951-52).

[52] Hirshberg v. Cooke, 336 U.S. 210 (1948).

remedy this problem by permitting the trial by court-martial in specified cases of persons who had been separated from the military service.[53] The constitutionality of this provision was challenged in Toth v. Quarles.[54] Toth had served with the Air Force in Korea, was discharged, and returned to civilian life. Some months later he was arrested and taken to Korea to stand trial by court-martial for murder and conspiracy to commit murder. A petition for a writ of habeas corpus filed in his behalf was granted by the district court and dismissed by the Court of Appeals. In so doing, the latter sustained the constitutionality of Article 3(a). The Supreme Court divided 6-3 and held this provision unconstitutional. Justice Black gave the reason:

> Any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.[55]

By eliminating the possibility of a court-martial the Court ruled out

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[53] Uniform Code of Military Justice, Article 3(a), 64 Stat. 109 (1950). "Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

[54] 350 U.S. 11 (1955).

[55] Ibid., p. 15.

any trial since constitutional courts were without jurisdiction. The dissenters noted the effect of the ruling, and Justice Reed remarked, "The judgment just announced turns loose, without trial or possibility of trial, a man accused of murder."[56] But the majority felt that Congress could rectify this hiatus by legislation that would confer jurisdiction upon federal courts. One critic of the decision noted the incongruity of its holding:

> It would appear that the Supreme Court, through the Toth decision, has created a situation that bears a potentiality of injustice and social detriment completely out of proportion to that feared from the provisions in the Uniform Code of Military Justice unhesitatingly declared unconstitutional.[57]

The Toth decision proved to be a forewarning of the attitude that the Court assumed in dealing with civilians tried by military tribunals. In the first of a series of cases involving military jurisdiction over civilians the government maintained its position. In Madsen v. Kinsella[58] the judiciary ruled that a court of the Allied High Commission for Germany had jurisdiction to try a civilian dependent wife of a member of the armed services on a charge of murdering her husband. The petitioner argued unsuccessfully that court-martial and occupation court jurisdiction were separate, but

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[56] Ibid., p. 24.

[57] William R. Willis, Jr., "Toth v. Quarles--For Better or for Worse?" Vanderbilt Law Review, 9 (1956), 541.

[58] 343 U.S. 341 (1951).

the high tribunal held that they were concurrent. Furthermore, the German Civil Code under which the petitioner had been convicted applied here because it had been adopted by the United States Government for such areas. The power of these tribunals was based on Presidential authorization.

Article 2 (11) of the Uniform Code of Military Justice authorized trial by court-martial for civilian dependents accompanying military personnel overseas, and for civilian employees of the armed services at overseas bases.[59] This measure was designed to extend military jurisdiction to persons closely connected with the armed services but not actually in these forces and who otherwise would not be under any jurisdiction. On June 11, 1956 the Supreme Court declared this section of the Code constitutional over the dissents of Chief Justice Warren and Justice Black and Justice Douglas.[60] At issue was the validity of court-martial trials of two civilian dependents charged with the murder of their respective husbands. The petitioners claimed that such trials violated the Constitution because they deprived them of the protection provided by Article III and the Sixth Amendment. Justice Clark wrote the opinion of the Court and held:

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[59]The article makes the following persons subject to the Code. "All persons serving with, employed by, or accompanying the armed services without the continental limits of the United States . . ."

[60]Kinsella v. Krueger, 351 U.S. 470 (1955); Reid v. Covert, 351 U.S. 487 (1955).

> The Constitution does not require trial before an Article III Court in a foreign country for offenses committed there by an American citizen and that Congress may establish legislative courts for this purpose.[61]

The Court noted that the alternative to military jurisdiction would be trial before foreign courts.

> Congress may well have determined that trial before an American court-martial in which the fundamentals of due process are assured was preferable to leaving American servicemen and their dependents throughout the world usbject to widely varying standards of justice unfamiliar to our people.[62]

Besides the three dissenters, Justice Frankfurter reserved his views. A short time after its decision the Court decided to grant a motion for reargument of the cases.[63] Almost a year to the day after its first decision the Court reversed itself, and in Reid v. Covert[64] decided that Article " (11) was unconstitutional insofar as it authorized the Court-martial trials of civilian dependents for capital offenses committed abroad during peacetime. Justice Black spoke for the majority which included the Chief Justice and Justices Douglas and Brennan. Black announced that the argument that the Constitution does not protect American citizens abroad is fallacious.

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[61] Kinsella v. Krueger, 351 U.S. 470, 476 (1955).

[62] Ibid., p. 479.

[63] 352 U.S. 901 (1956).

[64] 354 U.S. 1 (1956).

Court-martial trials deprive civilians of three important constitutional guarantees; trial by jury, grand jury indictment, and the right to a speedy and public trial by an impartial jury in the State and district where the crime is committed. Black stated that none of these constitutional privileges were guaranteed by military trial, and significantly he added, "No agreement with a foreign nation can confer power on the Congress or on any other branch of the government which is free from the restraints of the Constitution."[65] Next, the Court examined and rejected the contention that such trials were constitutionally defensible as a "necessary and proper" means of implementing Article I, Section 8, Clause 14. The latter empowers Congress "To make rules for the Government and Regulations of the land and Naval Forces." Black asserted:

> In the light of history it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval forces.'[66]

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[65] Ibid., p. 16. In Wilson v. Girard, 354 U.S. 524 (1956), the Court sustained a waiver of jurisdiction over an American serviceman by military authorities in Japan. The waiver was in accordance with a Status of Forces agreement between the United States and Japan. A per curiam opinion announced, "We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches." (p. 530.)

[66] Ibid., p. 30.

An additional reason for limiting the scope of military trials was the uncertainty of the relationship of the Bill of Rights to military trials, "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."[67] Justices Frankfurter and Harlan concurred in separate opinions. Both were in substantial agreement on one issue; court-martial jurisdiction did not extend to civilian dependents accused of capital crimes in peacetime as was the case here. Clark and Burton dissented. They noted that there was no viable alternative to the approach sanctioned by Article 2 (11).

The practical problems raised by the Court case were not insubstantial. As a result of this decision civilian dependents were no longer subject to military trials for capital offenses. The inevitable question that now emerged was what type of jurisdiction would apply under such circumstances. Various solutions have been suggested ranging from trial before foreign courts to returning individuals to this country for trial. None are entirely satisfactory and none are without apparent difficulties.[68]

The literal decision of Reid v. Covert[69] was to proscribe court-

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[67] Ibid., p. 37.

[68] See "Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas," Harvard Law Review, 71 (1958) and "Courts-Martial Jurisdiction over Civilians in Peacetime," Virginia Law Review, 46 (1960).

[69] 354 U.S. 1 (1956).

martial trials of civilian dependents when capital crimes were involved and no more. However, distinction between capital and non-capital offenses was rejected initially by four members of the Court,[70] and three years later this distinction was discarded altogether. Article 2 (11) was invalidated as it applied to peacetime court-martial trials of civilians dependents accompanying the armed services outside the United States and charged with non-capital offenses under the Code of Military Justice.[71] Similarly, the Court refused to uphold court-martial trials of civilians employed overseas by the armed services whether the offense with which they were charged was capital[72] or non-capital.[73] Justice Clark, in an unexplained reversal of his previous position, announced the opinion of the Court in all the cases. In essence the attitude taken by the majority was that there were no circumstances during peacetime that permitted court-martial jurisdiction over persons not in the military service. It was simply a question of the status of the individual as to whether he or she was properly amenable to military jurisdiction. Justices Harlan and Frankfurter adhered to the stand they had taken in the recent Reid case. They were convinced that the nature of the crime rather than status was decisive, and that non-capital offenses

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[70] Chief Justice Warren, Justices Black, Douglas, and Brennan.

[71] Kinsella v. Singleton, 361 U.S. 234 (1959).

[72] Grisham v. Hagan, 361 U.S. 278 (1959).

[73] McElroy v. Guagliardo, 361 U.S. 281 (1959).

committed by civilian dependents or employees accompanying the armed services overseas could be tried before military courts-martial during peacetime. Justices Whittaker and Stewart agreed with the majority that the sole question was that of status. However, they argued that civilian employees of the armed services overseas could be tried before military courts-martial irrespective of the nature of the offenses. Civilian dependents were in a different category and were not "so closely related to and intertwined with"[74] the armed forces, as were civilian employees. Therefore, they were not subject to trial by court-martial.

The inexorable finality of the Court's ruling in these cases in no way diminishes the dilemma of the government. One observer commented:

> All these decisions can be viewed as logical, albeit far-reaching extensions of basic constitutional doctrines that persons who are not actually "in" the armed services are not to be deprived of the rights guaranteed them by the Constitution.[75]

The fact remains that pending Congressional action thousands of civilians now located on foreign installations are outside the criminal jurisdiction of the United States. The Court has thrown into the laps of the political branches a troublesome problem that must be solved. In doing so Congress will have to be mindful of the

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[74] Kinsella v. Singleton, 361 U.S. 234, 271 (1959).

[75] Duke, Vogel, p. 437.

judicial insistence that fundamental constitutional guarantees not be sacrificed. Running through all of these opinions is a distinct judicial aversion to broadening the scope of military jurisdiction during periods of peace. Barring a war or a distinct reversal in the philosophy of the Court the barriers that have been erected against extension of military control over civilians seem impregnable.

Military Commissions. While the most prevalent form of military tribunal in existence today, the court-martial is by no means the only agency that has been relied on by the military. The military commission is of historical as well as theoretical interest because of its frequent use during periods of hostilities. The commission differs from the court-martial with respect to purpose and jurisdiction. The latter is utilized principally to maintain discipline and to dispense justice to members of the armed services in accordance with established military law. A succinct definition of the scope of military commissions has been offered by Professor Fairman:

> A military commission is the tribunal which has been developed in the practice of our Army for the trial of persons not members of our forces who are charged with offenses against the law of war or, in places subject to military government or martial rule, with offenses against the local law or against the regulations of the military authorities.[76]

The military commission is not subject to the detailed statutory

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[76]Charles Fairman, "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case," Harvard Law Review, 59 (1946), 833.

provisions and limitations that govern the conduct of courts-martial, and consequently its procedures often furnish a more summary decision.[77] Historically, such commissions had their inception during the Mexican War when General Winfield Scott found such tribunals useful in dealing with civilians in the area of his operations.[78] The Civil War marked the first extensive use of the commission. In 1862 President Lincoln authorized trial before military commissions for persons charged with interfering with the draft.[79] Commissions were established during both the Spanish-American and First World Wars, but they were used with less frequency than during the Civil War.[80]

The classic case to reach the Supreme Court involving the jurisdiction of military commissions was Ex parte Milligan.[81] The curcumstances of this case were discussed in the first chapter. It will be recalled that the essential question concerned the validity of civilian Milligan's trial by a military commission in an area where the civil courts were open and operating. In deciding that such

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[77] Lewis Mayers, The American Legal System (New York, Harper and Brothers, 1955), p. 533.

[78] Harold L. Kaplan, "Constitutional Limitations on Trials by Military Commissions," University of Pennsylvania Law Review, 92 (1943-44), 122.

[79] Mayers, p. 527.

[80] Kaplan, p. 124.

[81] 4 Wallace 2 (1866).

tribunals were without authority to try civilians, a majority of the Court denied that Congress could authorize such trials. The minority, while agreeing with the rest of the Court regarding the absence of jurisdiction for Milligan's trial, was reluctant to withdraw conclusively power from Congress to permit such trials. The Milligan case, a landmark in American constitutional law, stands today as a reminder of civil supremacy over the military.

The most celebrated military commissions of World War II were those established to try the eight Nazi saboteurs apprehended in this country, and the tribunal created to try a Japanese general by the name of Yamashita. On the morning of June 13, 1942 four men crept ashore on Long Island. A few days later four others set foot on a lonely stretch of Florida beach. The purpose that had brought these eight men to the United States in the midst of war was sabotage. All had previously lived in this country but for the last eight years they had been residents of Germany, and their journey was undertaken to aid the Nazis. One was an American citizen. Their plan of sabotage of essential war industries was short-lived, and in a matter of weeks all were in the custody of the Federal Bureau of Investigation.

The machinery for the trial of the saboteurs was set in motion on July 2, 1942 with the appointment of a military commission by President Roosevelt. Simultaneously the Chief Executive announced that further attempts at sabotage by persons who were residents of, or subject to, enemy nations would be tried by military tribunals under the laws of war, and they would be denied access to the civil

courts.[82] Trial of the eight spies commenced on July 8, 1942. Immediately, efforts were made by the defendants to secure a writ of habeas corpus, but the district court denied permission to file for the writ. Appeal was made to the Court of Appeals, and concurrently a petition to the Supreme Court for certiorari was filed. On July 29, 1942 the Supreme Court convened in an extraordinary summer session. Two days later the Court rendered its decision.[83]

The major contention of the petitioners was that the military commission was without jurisdiction. It was claimed that the saboteurs had a right to trial by jury, and that the Presidential order was invalid because of its purported conflict with the Articles of of War. Chief Justice Stone spoke for a unanimous Court and rejected all the contentions of the petitioners. Concerning the validity of the detention of the saboteurs the Court remarked:

> The detention and trial of petitioners -- ordered by the President in the declared exercise of his powers as Commander in chief of the Army in time of war and of grave public danger -- are not to be set aside by the Courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.[84]

The Articles of War provided for courts-martial and military

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[82] Robert E. Cushman, "Ex parte Quirin Et Al -- The Nazi Saboteur Case," Cornell Law Quarterly, 28 (1942-43), 55.

[83] Ex parte Quirin, 317 U.S. 1 (1942).

[84] Ibid., p. 25.

commissions and Congress had sanctioned such trials. Furthermore:

> Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.[85]

Trial by jury was held inapplicable to military commissions, and the jurisdiction was clearly without defect.

> We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commissions, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.[86]

The Court did not expressly overrule the Milligan case in answering the petitioner's argument that the civil courts were open and operating, thus depriving the military of jurisdiction. Rather, the judiciary chose to regard the case as inapposite under the present circumstances. Milligan had been a citizen and resident of Indiana while those on trial here were enemy belligerents. Though the Supreme Court affirmed the authority of the President to prescribe rules of procedure for the conduct of the trial in accordance with Congressional authorization of such regulations, two significant reservations

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[85] Ibid., p. 30.

[86] Ibid., p. 45.

were noted. First, the justices avoided ruling on the authority of the President to establish military tribunals independent of Congress. Secondly, the Court found it unnecessary to decide what restrictions, if any, Congress could impose on the President's power over enemy belligerents.

Perhaps the most significant aspect of the Quirin case was not that the Court sustained military jurisdiction, but that it even considered the fate of the eight Nazi saboteurs. Professor Corwin was critical of the Court's review of the controversy, tersely characterizing the opinion "as little more than a ceremonious detour to a predetermined goal intended chiefly for edification."[87] Quite possibly the Court viewed its role as twofold. First, the judiciary demonstrated its willingness to accord judicial review to enemies in wartime, however perfunctory, thereby emphasizing that access to the civil court remains unimpaired even during hostilities.[88] Additionally, the political branches of government would obviously be on sounder ground if they had the acquiescence of the Supreme Court. And it is difficult to believe that the nine justices would contest the actions of the President as Commander-in-Chief when the latter was engaged in

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[87]Edward S. Corwin, Total War and the Constitution (New York, Alfred A. Knopf (1947), p. 118.

[88]Alpheus T. Mason, "Inter Arma Leges: Chief Justice Stone's Views," Harvard Law Review, 69 (1955-56), 828. Stone's biographer relates, "The Chief Justice wanted the Court's opinion to be recognized as a striking demonstration that the law of the land still governed and that the jurisdiction of the Courts was not ousted no matter what the President proclaimed."

leading the nation in its struggle against the forces of totalitarianism.

Shortly after the conclusion of World War II the question of the punishment of war criminals became a factor of considerable importance to the victorious allies. Military commissions seemed to be the most appropriate tribunals to undertake this task. In the Far East one such commission was convened whose proceedings were destined to involve the Supreme Court in another celebrated dispute concerning civil-military relationships. The object of this contested litigation was a Japanese general by the name of Yamashita. The Japanese military leader had commanded the forces of the Rising Sun in the Philippines immediately prior to the Island's capitulation. On September 3, 1945 the Japanese general surrendered to the United States forces and became a prisoner of war. Three weeks later Yamashita was notified of charges that had been brought against him for violations of the rules of war. The substance of the bill of particulars was that Yamashita had failed to exercise proper control over the troops under his command, and that the latter had engaged in widespread atrocities before the fall of the Philippines. A military commission convicted him and the sentence prescribed was death. The Supreme Court agreed to review the case.[89] The resolution of the controversy rested on the answers to four questions. First, could the military tribunal in question try Yamashita? Secondly, was the commission legally constituted by "lawful

[89] In re Yamashita, 327 U.S 1 (1945).

military command?" If so, could the commission subject Yamashita to trial after the cessation of hostilities? Thirdly, did the authority to create such commissions extend beyond the conclusion of hostilities? And lastly, is a military commander required to take measures to control his troops, and if he fails to do so can he be held personally responsible?

The Court divided 6-2 with Chief Justice Stone speaking for the majority. (Justice Jackson took no part in the case.) On all points the Court ruled against Yamashita. First, the majority disposed of the allegation that the commission was without authority and outside the law:

> It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants.[90]

The Chief Justice could find no objection to the creation of the commission after the cessation of hostilities:

> We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been recognized by treaty or proclamation of the political branch of the government.[91]

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[90] Ibid., p. 11.

[91] Ibid., p.12.

Moreover:

> The conduct of the trial by the military commission has been authorized by the political branch of the government, by military command, by international law and usage, and by the terms of the surrencer of the Japanese government.[92]

The offenses with which Yamashita was charged were violations of the laws of war. The Court substantiated this point by reference to the Annex to the Hague Convention of 1907. The judiciary reaffirmed its traditional refusal to pass on the evidence introduced in cases involving military tribunals. The charges were sufficient, whether true or not, to allow the case to go to trial, and the review of the alleged errors in the proceedings was entirely in the hands of the appellate military tribunals. In conclusion the majority held:

> It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war and that the Commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command.[93]

Justices Murphy and Rutledge dissented. They disagreed with the Court on the jurisdictional issue, and they were offended by the conduct of the trial. When the Supreme Court denied permission to file a petition for a writ of habeas corpus to another Japanese general in

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[92] Ibid., p. 13.

[93] Ibid., p. 25.

circumstances similar to Yamashita's,[94] Murphy and Rutledge again dissented. The language of the former justice was particularly impassioned:

> Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world.[95]

The Quirin, Yamashita, and Homma decisions attest to the stringent limitations that the Court has imposed on civil review of judgments rendered by military commissions.[96] On all of the occasions that the Supreme Court considered the actions of military commissions it has consistently refused to review the evidence. Military tribunals during the past twenty years have been used primarily during periods of actual hostilities, or immediately thereafter. To some degree this fact may explain the unwillingness of the Court to create any substantial obstruction. It can hardly be suggested that decisions relating to peculiar wartime conditions will be considered as valid precedents for any expansion of such tribunals in peacetime, and barring an outbreak of war the military commission may very well be a

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[94] Homma v. Patterson, 327 U.S. 759 (1945).

[95] Ibid., p. 760.

[96] In Hirota v. MacArthur, 338 U.S. 197 (1948), the Court refused to review the decisions of military tribunals established by General MacArthur as the agent for the Allied Powers.

relic of the past.

Martial Law. The term martial law (or martial rule, as it is sometimes denominated) is not mentioned in the United States Constitution. The nearest equivalent is the provision for the suspension of the privilege of the writ of habeas corpus.[97] In its most general sense martial law involves the substitution of military control for civilian rule in times of grave emergency and the use of military law rather than the traditional civil processes.[98] Insurrections, the break-down of civil law and all-out war may furnish the occasion for the imposition of martial rule. From time to time state governors have proclaimed a state of martial rule when local conditions could not be controlled by civil authorities in particular areas.[99] The utilization of martial rule apart from wartime conditions does not bear on the question of national security and need not be considered here. The classic statement by the Supreme Court on martial law was enunciated in the Milligan case in 1866: "Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction."[100] Until 1941 the Civil War represented the only time when martial law was employed in wartime.

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[97] Article I, Section 9, Clause 2.

[98] Charles Fairman, "The Law of Martial Rule and the National Emergency," Harvard Law Review, 55 (1941-42, 1259.

[99] See Robert S. Rankin, When Civil Law Fails (Durham, Duke University Press, 1939).

[100] Ex parte Milligan, 4 Wallace 2, 127 (1866).

The institution of martial law in Hawaii occurred on the day after Pearl Harbor, December 8, 1941. The basis of this action was the Hawaiian Organic Act.[101] Section 67 specifically conferred on the Governor of the territory the right in times of emergency to suspend the privilege of the writ of habeas corpus and to place the island under martial rule. Subsequent Presidential approval was required. Announcement of the transfer of all power to the military was made and the island came under the control of a Military Governor.[102] President Roosevelt communicated his approval of the step taken on December 9, 1941.[103] Civil courts had in the meantime been supplanted by military commissions and provost courts.[104] On December 16, the courts were permitted to reopen, but their jurisdiction was substantially curtailed.[105] In January, 1942 further modifications and revisions in the status of the civil courts was accomplished, but the military authorities continued to exercise appreciable control over activities on the island.[106] Understandably, antagonism developed between military and civil officials as the threat of invasion

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[101] 31 Stat. 153 (1900).

[102] J. Garner Anthony, Hawaii Under Army Rule (Stanford, Stanford University Press, 1955), p. 5.

[103] Duncan v. Kahanamoku, 327 U.S. 304, 308 (1945).

[104] Anthony, p. 10.

[105] Ibid., p. 11.

[106] Ibid., p. 28.

receded, and in an effort to forestall an unpleasant situation Washington announced on March 10, 1943 that some of the functions heretofore performed by the military would now be handled by civilian authorities. Notwithstanding these alterations the privilege of the writ remained suspended.[107]

The Supreme Court's involvement in the Hawaiian episode was limited to a single case, Duncan v. Kahanamoku.[108] The facts of the controversy were these: White was a civilian engaged in a stock-brokerage business. In August, 1942 he was arrested and tried for embezzlement by a military tribunal. White contested the jurisdiction of the tribunal in habeas corpus proceedings. The other petitioner in the instant case, Duncan, was employed as a civilian shipfitter at the Naval Yard in Honolulu. On the night of February 24, 1944 Duncan was involved in an altercation with two sentries. He was arrested and brought to trial before a military tribunal. At the time of the commission of the offense the civil courts were open, but they were denied authority over certain cases. Both White and Duncan obtained habeas corpus relief in the district court, but the Court of Appeals reversed. The question as phrased by the Supreme Court was:

> Did the Organic Act during the period of martial law give the armed forces power to supplant all civilian

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[107] Robert S. Rankin, "Martial Law and the Writ of Habeas Corpus in Hawaii," Journal of Politics, 6 (1944), 214.

[108] 327 U.S. 304 (1945).

> laws and to substitute military for judicial trials under the conditions that existed in Hawaii at the time these petitioners were tried?[109]

To arrive at an answer the Court examined the Organic Act, and because the law was not specific, the judiciary sought to ascertain Congressional intent. The majority queried:

> Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal citizens in loyal territory should have their daily conduct governed by military orders substituted for criminal laws and that such civilians should be tried and punished by military tribunals?[110]

Six Justices responded to both questions in the negative, Justice Black, joined by three of his colleagues, asserted:

> The phrase "martial law" as employed by that act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.[111]

Justice Murphy concurred in the Court's opinion, and declared that trials of this nature were forbidden by the Bill of Rights. Chief Justice Stone opined that conditions in Hawaii at the time did not

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[109] Ibid., p. 313.

[110] Ibid., p. 319.

[111] Ibid., p. 324.

warrant trial by military tribunals. The dissents of Justices Burton and Frankfurter demonstrated a concern for the proper respect to be accorded to the political branches in their assessment of military needs. They viewed the Court's decision as an unnecessary intrusion "into the fields allotted by the Constitution to agencies of legislative and executive action."[112] Kahanamoku delimited the scope of martial law with respect to the Hawaiian Organic Act. The decision underscored the basic premise of the incompatibility of military rule outside the battle zone so long as civil courts were in a position unobstructedly to perform their duties. Yet, the crucial question of the permissible extent of martial rule under other conditions remained unexplored, and the content of "martial law" in modern dress is unclear.

Summary. American tradition has placed great emphais on the belief that the military is somehow inconsistent with a democratic society. So long as war was the exception rather than the rule, civil-military relationships were maintained within a framework of civil supremacy, and the Supreme Court was plagued by problems of adjusting frequent clashes between the two systems. Aside from the Civil War, American history until 1941 was largely free of any expansion of military authority which challenged the basic premises of a non-militaristically-oriented nation. The events that have transpired since 1941 have produced new tensions and stresses in this

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[112] Ibid., p. 338.

relationship. The American people have not known peace in twenty years, in the sense of the absence of international conflicts and tensions. True it is that after 1945 there has been no global struggle, but a cold war has emerged and with it a realization that military preparedness must remain a fact of life.

That being the case, the military has achieved a new importance. Selective Service has transformed the character of military personnel, total war has blurred the demarcation of civil-military authority, and the post-war military commitments of the United States have extended military control outside the territorial limits of the United States.

Inevitably, these circumstances have raised constitutional problems of profound significance. The Supreme Court has displayed uncertainty in its treatment of these controversial issues. During World War II the judiciary confronted the dilemma of bestowing sanction upon new advances in military authority at the expense of traditional civil supremacy; or checking the expansion of this authority at a time of grave peril and thereby incapacitating the very forces best equipped to restore peace. In the aftermath of war a revitalized Court could proceed more boldly in establishing limits to the exercise of military power because the absence of hostilities seemed to justify stronger judicial checks.

In many respects, the gulf between military and civilian has been bridged, and military justice has been made more conformable with accepted civil practices. But it is unlikely that the two can merge

because of their differences in approach and goals. As it seems that America is destined to live in an atmosphere somewhere between war and peace for years to come, the questions raised in this chapter cannot be accorded definitive answers.

CHAPTER VIII

AN EVALUATION

The national security of the United States has been of major concern to both the government and the people during the past twenty years. It has presented substantial judicial as well as political problems, the complexity of which has evoked unending controversy. This study has been concerned with the judicial responses to the expansion of governmental power in this domain and with the frequent clashes that have occurred between the state and the individual. Totalitarian philosophies have posed serious threats to the preservation of democratic institutions. In reacting to the dangers of alien ideologies the American government has been guided by traditional constitutional principles tempered by practical considerations of the needs of internal security. Not infrequently the political branches have eschewed restrictive interpretations of their powers in favor of a more flexible approach to the pervasive threat of totalitarianism.

A variety of devices have been employed to bolster the defense structure of the country. Billions of dollars have been expended for armaments, a standing army has been maintained, and federal regulation of private affairs has increased. Elaborate and detailed programs have been initiated in an effort to strengthen the resistance of the

democratic state. Oaths, investigations, legislation, and growth of executive power have been utilized. In this security-conscious environment the Supreme Court of the United States has been confronted with the adjustment of the demands of security to individual liberty. Within these controversial, speculative, and emotionally-charged spheres of constitutional and statutory adjudication the judiciary has fallen heir to the troublesome problems of national security.

Judicial pronouncements have been rendered on a large number of issues, and yet analysis fails to reveal a logical and consistent pattern. Rather, it appears that the Court has been unsuccessful in constructing a systematic concept of national security. This fact is attributable in large measure to the deep-seated disagreements on the Court. Persistent and vigorous criticism has accompanied the opinions of the high tribunal. The result has been an irregular and sometimes confusing record of judicial decisions. Nevertheless, it would be incorrect to characterize judicial conduct as lacking any common denominator. As it essayed to solve perplexing constitutional problems the Court proceeded from a basis of agreement on certain fundamental precepts.

One solution to emergencies that has been emphatically rejected by the Court is constitutional suspension. No justice, either explicitly or implicitly, has suggested that war or other threats to the nation results in the removal of all constitutional restraints. Quite the contrary, the judiciary has pointedly asserted that the Constitution is a document for war as well as for peace, and that its

provisions are not to be regarded as obsolete simply because the nation's security is imperiled. Inter arma leges silent, the state of seige, constitutional suspension (or whatever nomenclature is selected to apply to this phenomenon) finds no sanction in the opinions of the Supreme Court.

While the Constitution remains effective and applicable under all circumstances, there is general judicial agreement that its provisions clothe the government with extremely broad power in the midst of war or similar emergencies. The words of Chief Justice Hughes are often recalled, "while emergency does not create power, emergency may furnish the occasion for the exercise of power."[1] When the emergency is the self-preservation of the democratic state it requires no great wisdom to foresee a judicial acquiescence of considerable dimensions.

There is also judicial acknowledgment that the powers of self-preservation are of the very essence of sovereignty and nationality. It follows, therefore, that no nation is powerless to defend itself, and even in the absence of constitutional provisions there would be ample power inhering in the sovereign state to take whatever measures were necessary for survival. There is, to be sure, a lack of unanimity on the Court about the implications of these doctrines. Inasmuch as there is a Constitution grafted upon whatever powers accrue from

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[1] Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426 (1934).

sovereignty there has been a tendency to confuse the two. Likewise the predispositions of members of the Court have had much to do with their conception of inherent and constitutional powers. Those justices who have been inclined towards a latitudinarian philosophy of the powers of national security seem more favorably disposed to inherent power. Other jurists regard with suspicion inherent powers, preferring to rely on the Constitution entirely. Regardless of these differences it seems correct to categorize the judiciary as fully in sympathy with the contention that in times of crisis the federal government is endowed with substantial power. Moreover, there is, inferentially at least, recognition of the doctrine that the powers of national security are closely intertwined with self-preservation, and the latter is an attribute of sovereignty. It is difficult to indicate the precise nature of judicial thought on this subject because it rarely is articulated with any degree of specificity.

Throughout the opinions of the Court in the past two decades is another generally accepted premise of judicial conduct. The authority of judicial review exists no matter how grave the emergency or how cumbersome judicial procedures may be in times of crisis. It is true that there have been definite differences of opinion as to the character of review that should be extended, but the Court, like the Constitution, is operative in both war and peace. Obviously the appellate jurisdiction of the Court is subject to control by Congress. Therefore, the legislature may restrict or expand the review powers of the Supreme Court. However, it does not follow that the Court will

take it upon itself to circumscribe its own powers of review in the absence of Congressional limitation. Doubtless, from the standpoint of practical politics there may be merit in the technique of refusing to grant review. But the Court has manifested no enthusiasm for diminishing judicial scrutiny of national security policies even during periods of all-out war.

In 1942 Chief Justice Stone delivered the opinion of the Court in the Nazi saboteur case.[2] One of the questions of the dispute was whether the Court could extend review in the face of the President's order denying all access to the civil courts. In spite of this pronouncement Stone held:

> Neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioner's contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.[3]

Moreover, the Court has refused to take legislative silence as necessarily proscribing judicial review. In applying this doctrine to the Selective Service Act, Justice Douglas remarked:

> The silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them.[4]

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[2] Ex parte Quirin, 317 U.S. 1 (1942).

[3] Ibid., p. 25.

[4] Estep v. United States, 327 U.S. 114, 120 (1945).

In the same case Douglas noted, "judicial review may indeed be required by the Constitution."[5]

Justice Jackson registered a lone dissent to the contention that the courts must be prepared to accord review even under wartime conditions. Dissenting in Korematsu v. United States,[6] the jurist averred, "I should hold that a civil court cannot be made to enforce an order which violates the constitutional limitations even if it is a reasonable exercise of military authority."[7] Moreover, Jackson continued, "I would not lead people to rely on this Court for a review that seems to me wholly delusive."[8] Simply stated, Jackson would abandon judicial review in wartime rather than subject the prestige of the Court to obviously unconstitutional acts. This unique approach was never put into operation and never gained the support of other justices. Even though judicial review might amount to little more than a perfunctory examination, the Court was nonetheless in agreement that even limited judicial review was better than none at all.

Thus it is that analysis of judicial decisions relating to national security reveals a consensus as to the broad powers of self-preservation, the maintenance of the Constitution during war, and the

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[5] Ibid.

[6] 323 U.S. 214 (1944).

[7] Ibid., p. 247.

[8] Ibid., p. 248.

continued functioning of the judiciary as a body with reviewing powers. There were general principles to which all justices could subscribe. But these generalizations were inadequate to cope with particular issues that called for more refined reasoning. Price control, deportation policies, the investigatory power, loyalty oaths, military jurisdiction are all facets of national security. Mere reliance on the generally accepted postulates aforementioned in no way eventuates in a solution.

In seeking to resolve the controversial problems of national security the Court found itself unable to formulate a consistent and coherent judicial doctrine. There is emphatically no evidence that the judiciary conceived its task to be that of supplying content to the amorphous phrase, national security. Fundamental differences on the Court, rapidly changing world events, and the fluctuations in the policy of the political branches produced unending controversies. Certain observations can nevertheless be made to illuminate the role of the Court.

Analysis of judicial pronouncements underscores the assertion that the Supreme Court has been remarkably acquiescent in the assumption of power by the government. Basic security policy carefully enunciated by the Congress and the Chief Executive received judicial support in practically every instance. The record is indeed impressive. Price and rent control enacted in the midst of war was

upheld[9] -- not a single justice denied the power of Congress to control prices. The confiscation of alien property was endorsed unanimously.[10] Wartime contract renegotiation under terms prescribed by Congress was sustained.[11] The deportation of aliens for past membership in the Communist Party was affirmed.[12] The non-Communist affidavit of the Taft-Hartley Act was held constitutional.[13] Congressional investigations of subversion were sanctioned.[14] The Smith Act was ruled constitutional,[15] and military commissions[16] as well as courts-martial[17] were not seriously hampered by civil court interference.

On no occasion did the Supreme Court invalidate a major piece of legislation that was clearly designed to promote internal security. Only three times did the judiciary declare any act of Congress in this field unconstitutional. Two provisions, Article 3(a) and

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[9] Yakus v. United States, 321 U.S. 414 (1944); Bowles v. Willingham, 321 U.S. 503 (1944).

[10] Silesian-American Corporation v. Clark, 332 U.S. 469 (1947).

[11] Lichter v. United States, 334 U.S. 742 (1948).

[12] Harisiades v. Shaughnessy, 342 U.S. 580 (1951).

[13] American Communications Association v. Douds, 339 U.S. 382 (1950).

[14] Barenblatt v. United States, 360 U.S. 109 (1958).

[15] Dennis v. United States, 339 U.S. 162 (1951).

[16] In re Yamashita, 327 U.S. 1 (1946).

[17] Hiatt v. Brown, 339 U.S. 103 (1949).

Article 2 (11), of the Uniform Code of Military Justice were struck down,[18] and the Court invalidated a legislative rider that cut off the salaries of three government officials.[19] In the first two instances Congress sought to extend the jurisdiction of courts-martial beyond their traditional scope. In the latter case a Congressional appropriation measure was designed to force three public officials out of office. Independent executive action also fared well at the hands of the Court. Yet one striking exception has occurred. In 1951 the Court declared President Truman's seizure of the steel mills invalid.[20] Statistically, therefore, in twenty years the Supreme Court has invoked the Constituion only four times to challenge the powers of the President and/or Congress in matters of national security. The inescapable conclusion is that the substantive power of the federal government to provide for the safety of the nation is indeed sweeping.

Perhaps the most significant task performed by the Court has not been in deciding constitutional questions of major import. If the judiciary has been hesitant to grapple with constitutional issues, it has been forthright in its insistence that governmental policy be implemented according to the letter of the law. Whatever judicial

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[18] Toth v. Quarles, 350 U.S. 11 (1955); Kinsella v. Singleton, 361 U.S. 234 (1959).

[19] United States v. Lovett, 328 U.S. 303 (1946).

[20] Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952).

tolerance existed with respect to the substantive powers of the federal government, there was an obvious aversion to the unwarranted assumption of power by individual officials. While the Court manifested no proclivity for challenging the joint exercise of power by the President and Congress, it did display a keen awareness and appreciation for procedural guarantees incorporated within the law. At this level the justices could actively supervise the implementation of large-scale programs without falling victim to the accusation of judical usurpation. The political branches were relatively free from judicial restraint in the initiation of policies affecting national security, but the administration of the law had to comply with the standards that Congress and the President established. Ultra vires acts felt the judicial axe frequently.

The problems of security have been manifold, and they have often led to infringements of individual liberties. Consequently, assaults have been made on the constitutionality of legislative and executive action. Any systematic and coherent schema of national security would require clarification and decision by the Court on all of these questions. Yet a careful examination of the Court's rulings does not provide this clarity. Probably the chief reason is that more has been left unsaid by the Court than said. Many constitutional issues were skillfully evaded with the result that there is much about national security today that remains judicially undecided.

It should be emphasized that these topics were often discussed

at length in dissenting opinions, but in no instance was a majority ready to decide the issue. A recital of these questions indicates the *lacunae* in constitutional doctrine concerning national security. Although the Court often reviewed disputes growing out of the federal loyalty-security program, never once did it explicitly declare these procedures constitutional. Admittedly the decisions rendered on this subject strongly suggest that the Court acknowledged the validity of the programs without expressly saying so. The celebrated Attorney-General's list was never examined on its merits. To this date the Court has not stated whether that legal officer of the government may list organizations as subversive. Also lacking is a precise delineation of the scope of due process to be afforded in loyalty investigations. Specifically, confrontation and cross-examination have been urged upon the Court as constitutional requirements in loyalty proceedings. So far the Court has given no answer. It is true that at least a majority came close to such a declaration in *Greene* v. *McElroy*,[21] but these procedures still have not been treated as constitutional components of due process. Can Congress authorize the Secretary of State to deny passports to Communists? A Court majority has decided that Congress, under present legislation, has not authorized the Secretary of State to refuse passports for this reason.[22] But as yet there is no ruling on the constitutional

[21] 360 U.S. 474 (1958).

[22] *Kent* v. *Dulles*, 357 U.S. 116 (1957); *Dayton* v. *Dulles*, 357 U.S. 144 (1957).

authority of Congress to grant this discretion to the executive branch.

The investigatory power of Congress and of the states has not been expressly challenged by the Court, but at the same time no specific bounds to the exercise of that power have been established. The balancing formula adopted in the Barenblatt[23] and Uphaus[24] cases does not provide any real answer to the ultimate reaches of inquiries into subversion. No doubt there were occasions when the Court would have preferred to avoid a constitutional question, but the circumstances would not permit further evasion. A case in point was the Japanese curfew and exclusion orders.[25] Nonetheless the judicial decisions were confined as much as possible, and the Court refused to be placed in the position of having to decide the validity of the detention program, other than to hold that admittedly loyal citizens could not be subjected to these procedures.[26] Left in abeyance was the general scope of the power of detention in wartime.

The Court was also reticent to issue a definitive statement concerning military jurisdiction. For example, a particularly significant and timely issue is the extent of protection, if any, afforded

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[23] Barenblatt v. United States, 360 U.S. 109 (1958).

[24] Uphaus v. Wyman, 360 U.S. 72 (1958).

[25] Hirabyashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

[26] Ex parte Mitsuye Endo, 323 U.S. 283 (1944).

the servicemen by the Bill of Rights; in other words, is that portion of the Constitution applicable to trials before military tribunals? Other than an admission by a majority of the Court in the Burns[27] case that vaguely suggested due process as applicable to the military under some circumstances (and the circumstances were not defined), there has been no clearcut analysis in any majority opinion of the relationship between the Bill of Rights and military trials. Military commissions were used during World War II, and at no time did the judiciary contest their jurisdiction. But concurrently the Court refrained from confronting and deciding upon all the ramifications of the use of military commissions. The judiciary reserved decision on the authority of the President to establish military tribunals independent of Congress. Similarly, the high tribunal found it unnecessary, and certainly expedient, to decide what restrictions, if any, Congress could impose on the President's authority over enemy belligerents. Martial law is still without comprehensive judicial analysis. Duncan v. Kahanamoku[28] was decisive only for Hawaii and did not attempt to limit the constitutional extent of martial rule.

The foregoing is not intended to be an exhaustive list of unresolved problems relating to national security, but it suffices to illustrate the interstices that remain. In the absence of extensive consideration of these and other aspects of internal security it would

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[27] Burns v. Wilson, 346 U.S. 137 (1952).

[28] 327 U.S. 304 (1946).

be difficult to ascertain the judicial conception of national security, if indeed there is one.

On the Court itself there has been no clear consensus as to the proper judicial treatment of national security cases. One facet of this internal dissension has been the disagreement over the threat posed by totalitarianism and the steps that may be constitutionally taken to safeguard the nation. The subsequent comments are especially instructive and emphasize this basic divergence.

Concerning the Communist Party Justice Jackson commented, "The Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."[29] Justice Douglas, on the other hand, minimized the danger of Communism in this country and referred to American Communists as "miserable merchants of unwanted ideas, their wares remain unsold."[30] But to quote Jackson again, "The Communist Party is something different in fact from any substantial party we have known, and hence may constitutionally be treated as something different."[31] Justice Douglas asserted, "In days of great tension when feelings run high, it is a temptation to take short-cuts by

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[29] American Communications Association v. Douds, 339 U.S. 382, 423 (1949).

[30] Dennis v. United States, 341 U.S. 494, 589 (1951).

[31] American Communications Association v. Douds, 339 U.S. 382, 423 (1949).

borrowing from the totalitarian techniques of our opponents."[32] Chief Justice Vinson stressed the danger of a government powerless to act in its own defense. "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion must lead to anarchy."[33] Justice Black cogently stated the libertarian's point of view on security:

> The First Amendment provides the only kind of security system that can preserve a free government -- one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.[34]

These comments give some insight into the predilections of individual justices, and they demonstrate the lack of agreement over the proper course of judicial action.

The practioners of judicial self-restraint and the advocates of judicial activism have vied for control of the Court. Justice Frankfurter has been the spiritual leader of self-restraint, urging that the Court must show proper deference to the political branches in their assessment of the needs of security. Accordingly, this wing of the Court has viewed the expansion of governmental power primarily in

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[32] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1950).

[33] Dennis v. United States, 341 U.S. 494, 501 (1951).

[34] Yates v. United States, 354 U.S. 298, 344 (1957).

terms of whether or not the legislature could reasonably conclude that such steps were required. Repeatedly, the advocates of self-restraint reminded their colleagues and the country that the wisdom and advisability of political action were outside the province of judicial concern. Justice Black, as spokesman for the libertarian point of view, has most frequently been Frankfurter's antagonist. The activists, while professing respect for Congress and President, insist that the test of reasonableness cannot make an unconstitutional act valid. Moreover, any policy that threatens individual freedom is presumptively suspect. The alignments on the Court have never been fixed, and changes in personnel have resulted in modifications. By and large, the evidence indicates no firm commitment by the Court to either of these philosophies.

How often and how much judicial opinions are influenced by external non-legal pressures has long been interesting speculation. Louis Smith has made the trenchant observation that the Supreme Court follows the reports from the battlefield in determining its decisions with respect to military matters.[35] There seems to be more than a grain of truth in this assertion. When dealing with national security, the Court has undoubtedly been swayed by the possible adverse effect of its pronouncements. It has candidly admitted reliance upon the exigencies of war to justify actions that concededly would be invalid

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[35] Louis Smith, American Democracy and Military Power (Chicago, University of Chicago Press, 1951), p. 303.

in periods of tranquility. Military necessity was employed to rationalize curfew and exclusion orders on the West Coast in the early days of World War II.[36] The character of the Communist conspiracy was frankly acknowledged as a justification for permitting legislation that confessedly infringed constitutional rights.[37] It may be that the Court rationalized these policies because the world situation required that the American government exercise extensive power. Needless to say, elaborate vindications lent constitutional respectability to questionable measures.

Prudence, moreover, dictated that the Court proceed with caution. An open break between the judiciary and the other two branches of government, especially in wartime, would be as unfortunate as it would be disastrous for an independent judiciary. Presumably, the instinct of institutional self-preservation is strong enough to forestall such an eventuality, assuming that the Court was disposed to assert its power in such a manner as to lead to this sort of crisis. Given the submission of the Court during the last war, it is improbable that there will be serious differences between the Court and its sister branches in some future war. In any event, it is unlikely that the Court could withstand the concerted pressure of the political branches if the latter flatly refused to acknowledge the validity of the Court's decisions. The prestige and authority of the Court depend

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[36] Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

[37] Dennis v. United States, 341 U.S. 494 (1951).

directly on the support it derives from the rest of the government and from the people, support which is given because of a firm belief in the supremacy of law. Without this support the Supreme Court would atrophy.

Since 1945 there has been no global war, but the threat of totalitarianism has not abated, and the difficulties of the Court have in no way lessened. The security of democratic America has remained of crucial importance in the post-war era, and the rapidly changing events in international affairs have brought corresponding alterations in domestic policy. Therefore, national security has taken on meaning in direct proportion to the fluctuations in external dangers. The convenient appeals to military necessity no longer existed as a useful device for the Supreme Court. Instead the Court had to devise new tests for novel problems.

Indecision, fluctuation, and evasion to a large extent characterized judicial reasoning in the post-war period. Although a majority could usually be found to sustain key legislation affecting national security, on very few occasions could the justices submerge their personal views and arrive at a uniform expression of opinion. Rarely did an important decision issue from the Court that was not accompanied by numerous concurrences and vigorous dissents. Judicial explanations often confused rather than clarified the scope of governmental power, and the public no less than the political branches pondered the exact meaning to be attached to Court pronouncements. It is not surprising that in the atmosphere of contention that surrounded

the Court it became increasingly difficult to extract a trend of judicial philosophy.

From the perspective of 1960 a survey of judicial decisions over the past two decades discloses a marked correlation between judicial reaction to national security and the changes in the nature of the threat of totalitarianism. From 1941 to 1945 a total war was waged that required total effort. The Supreme Court did not seriously interfere in the exercise of the war powers. Beginning about 1947 the relations between the United States and Soviet Communism deteriorated and the fear of subversion and disloyalty produced new and far-ranging programs designed to preserve internal security. During the same period the Court gave its support to these programs, and few attacks levelled against security legislation met with any success before the Court. In 1953 a new era began. International tensions relaxed and the hostility evident in the late 1940's diminished. Coincidentally, the judiciary exhibited a growing concern for individual liberty and judicial opinions examined more critically the underlying premises of governmental assertions of power. Although a cause-and-effect relationship does not necessarily follow from these observations, it is significant that the judiciary has never been far out of step with the prevailing governmental policy on national security.

In view of these considerations the effectiveness of the Court will to a large degree depend upon its ability to adjudge correctly the temper of the times as they reflect the dangers of totalitarianism.

Accordingly, constitutional absolutism has been discarded by a Court that has been unwilling to prescribe rigorous restraints on the exercise of power to meet these threats. Neither has the judiciary been amenable to any suspension of constitutional privileges or to the derogation of individual liberty.

The resiliency and adaptability of the American constitutional system has stood the test not only of war, but also of the continuing perils of Fascist and Communist ideology. In the midst of rapidly changing world conditions and uncertain domestic problems, the Supreme Court has sought to give expression to the inarticulate feelings of a democratic America. If it has been less than successful in this endeavor, perhaps the blame attaches not to the Court but to the society. For there is no evidence that the American people or its elected representatives have successfully arrived at the point of agreement on the exact delimitations of national security. Critics both on and off the Court will continue to dispute its decisions and rationalizations as they have done in the past. The Court is a human and, for that reason, an imperfect institution. Certainly it possesses no greater wisdom in its collective capacity than the society of which it is a part.

While the direction of the Court has appeared at times erratic and uncertain, it nevertheless has adhered to the fundamental precepts of a democratic state. A recognition of and respect for majority rule, individual liberty, and the rule of law has guided the judiciary

perhaps more than the other branches of government. Without these principles no consensus would be possible. The role of the Court has not been clearly defined either by the justices or anyone else. Doubtless it cannot be and perhaps should not be. For the strength of the judiciary today lies in its ability to remain flexible -- to apply checks when necessary, and to apply and to remove restraints when advisable.

Totalitarianism will probably be a threat to the United States for years to come. National security will be a focal point of judicial consideration as long as the danger of alien ideologies lasts. The Supreme Court will remain as the preserver of the Constitution. And upon the stability of that document and the conscientious,wise, and practical use of its provisions may depend the fate of democratic America in its struggle against the forces of totalitarianism.

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